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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

No. 57.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 4, 1905.

(20,653.)

(20,653.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 274.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Impleaded with NATHAN GUILFORD and FRED L. POMEROY.

Petition for Writ of Error.

To the Honorable the Judges of the Circuit Court of the United States for the Second Circuit:

Comes now the above named defendant the New York Central and Hudson River Railroad Company, by Albert H. Harris, its attorney, and complains that in the record and proceedings lately had in the above entitled cause on an alleged indictment purporting to charge joint violations by this defendant and two of its agents of the Act of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States," and in the judgment and sentence therein rendered against this defendant on the 19th day of October, 1906, manifest error hath intervened to the great damage of this defendant, as by reference to the said record and proceedings and the assignment of errors herewith filed will more fully and at large appear.

Wherefore this defendant prays for the allowance of a writ of error, and for such other orders and process as may cause
2 all and singular said record and proceedings in the said cause to be sent to the Justices of the Supreme Court of the United States at the Capitol in the City of Washington in the District of Columbia, so that the same being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done; and that the said writ of error may be made a supersedeas, and that execution of the judgment in this cause and all proceedings therein may be superseded and stayed pending the final determination, judgment and mandate of the said Supreme Court.

And your petitioner will ever pray.

Dated, New York, March 2nd, 1907.

ALBERT H. HARRIS,
Attorney for the Defendant-Petitioner, 417 Grand Central Station, Manhattan, New York City.

(Endorsed:) United States Circuit Court, Southern District of New York.—United States *vs.* New York Central & Hudson River R. R. Co. *et al.*—Petition for Writ of Error.—Albert H. Harris, Attorney for Petitioner.—Service admitted March 4th, 1907. Henry L. Stimson.—U. S. Circuit Court, Southern District New York, Filed Mar. 4, 1907, John A. Shields, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America and The New York Central and Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy, a manifest error hath happened, to the great damage of the said The New York Central and Hudson River Railroad Company, as is said and appears by its complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States at the Capitol in the City of Washington, in the District of Columbia, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 30" day of March, 1907, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and
4 according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 2" day of March, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. Let the same operate as a supersedeas upon the filing with the Clerk a good and sufficient bond for damages and costs in the sum of $108,000.00

E. H. LACOMBE,
U. S. Circuit Judge.

5 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from one to 165 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The New

York Central and Hudson River Railroad Company, plaintiff in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the second Circuit, this 28th day of March in the year of our Lord, one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

6 [Endorsed:] E. & O. E. 2560. Supreme Court of the United States. The New York Central & Hudson River R. R. Co., Plaintiff in error, *vs.* The United States of America, Defendant in error. Writ of Error. Albert H. Harris, Attorney for Pl't'ff in error. U. S. Circuit Court, Southern District, New York. Filed Mar. 4 1907. John A. Shields, Clerk.

Service admitted March 4th, 1907.

HENRY L. STIMSON.

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the city of New York, within and for the District and Circuit aforesaid, on the second Wednesday of March in the year of our Lord one thousand nine hundred and six and continued by adjournment to and including the fourth day of May, in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present that at the times hereinafter mentioned, the New York Central & Hudson River Railroad Company was, and still is, a railroad corporation duly organized under, and existing by virtue of, the laws of the State of New York and engaged in the transportation of passengers, freight and property for hire, over a continuous line and route from the city of New York, in the State of New York, by way of the Southern District of New York, to the city of Detroit, in the State of Michigan, on and by its own railroads and the railroads of connecting common carriers, under a common control, management and arrangement for a continuous carriage and shipment, and at all such times the said New York Central and Hudson River Railroad Company was a common carrier, subject to the provisions of an act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and of the acts amendatory thereof and supplemental thereto, and was en-

gaged in the transportation over the said continuous line and route of many different kinds of freight and property in interstate commerce.

That at all the times herein mentioned, the said New York Central & Hudson River Railroad Company and said connecting common carriers had jointly established and had filed with the Interstate Commerce Commission, as required by law, and had published a joint tariff of rates, fares and charges for the transportation of passengers and property in interstate commerce, which was in force at such times upon the said continuous line and route from the said City of New York to the said City of Detroit.

And the said joint tariff, so as aforesaid filed and published by the said railroad company plainly stated the places upon its railroad, and connecting lines, between which property and passengers would be carried and contained the classification of freight at said times in force.

That at all the times herein mentioned, the rates set forth in said joint tariff, so established, filed and published as aforesaid, from the said City of New York to the said City of Detroit, over the said continuous line and route, upon property of the character, kind and class hereinafter referred to, viz., the sugars hereinafter mentioned, was twenty-three cents for each one hundred pounds thereof.

8 That at all the times herein mentioned, "The American Sugar Refining Company" was a corporation organized and existing under and by virtue of the laws of the State of New Jersey and "The American Sugar Refining Company of New York" was a corporation organized and existing under and by virtue of the laws of the State of New York.

That at all the times herein mentioned the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York were engaged in selling and in shipping under a common management large quantities of sugars over the lines of the various common carriers leading out of the said City of New York and State of New York, including the line and route established as aforesaid from the said City of New York to the said City of Detroit in the State of Michigan aforesaid; that at all the times herein mentioned James Edgar (now deceased), C. Goodloe Edgar and Edwin Earle were co-partners, doing business in the said City of Detroit under the firm name of W. H. Edgar & Son, and were desirous of purchasing from the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, sugars to be shipped to them, the said W. H. Edgar & Son, from the said City of New York, in the State of New York.

And the jurors aforesaid, on their oaths aforesaid, do further present, that on the 26th day of April, in the year of our Lord nineteen hundred and four, at and in the Southern District of New York, and within the jurisdiction of this Court, upon the solicitation of one Lowell M. Palmer and one Thomas P. Riley, who were at all times herein mentioned, acting for and on behalf of and as agents of the said The American Sugar Refining Company and of the said The American Sugar Refining Company of New York, and of the

said firm of W. H. Edgar & Son, the said New York Central & Hudson River Railroad Company and its agents, to wit, Nathan Guilford and Fred L. Pomeroy, acting within the scope of their employment by the said last-named company, unlawfully and wilfully did offer to the said Lowell M. Palmer and to the said Thomas P. Riley, as agents of the said Sugar Refining Companies and of the said W. H. Edgar & Son, that in the event of any of said sugars being shipped by the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York to the said W. H. Edgar & Son, over the line and route aforesaid from the said City of New York to the said City of Detroit, and in the event of the consignors paying and procuring to be paid, to the said New York Central & Hudson River Railroad Company, as common carriers, the full rates and charges named in the said tariff as aforesaid, that is to say, twenty-three cents for each one hundred pounds so shipped and transported, the said New York Central & Hudson River Railroad Company would transport, and cause to be transported, said sugars over said line and route to the said City of Detroit and would grant and give a rebate and concession in respect of the said transportation of such sugars, to the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York and to the said W. H. Edgar & Son, of five cents for each one hundred pounds of sugar so shipped and transported to the said City of Detroit, the said sums, in such cases, to be refunded from the lawful amounts paid as aforesaid, according to the joint tariff of rates, fares and charges of twenty-three cents for each one hundred pounds of such shipments and transportations.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said New York Central & Hudson River Railroad Company, a corporation and common carrier, as aforesaid, and the said Nathan Guilford and Fred L. Pomeroy, its agents as aforesaid, in manner and form and by the means aforesaid, at and within the said District and jurisdiction, on the said 26th day of April, in the year of our Lord nineteen hundred and four, unlawfully and willfully did offer a rebate and concession in respect of the transportation of property, in interstate commerce, by a common carrier, subject to said
9 act to regulate commerce and the acts amendatory and supplemental thereto, with the intent that the said property should be transported at a less rate than that named in the joint tariffs aforesaid, published and filed by the said carrier, as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Second Count.

And the jurors aforesaid, on their oaths aforesaid, do further present, that at the times hereinafter mentioned, the New York Central & Hudson River Railroad Company was, and still is, a railroad corporation duly organized under and existing by virtue of the laws of the State of New York and engaged in the transportation of pas-

sengers, freight and property for hire, over a continuous line and route from the City of New York, in the State of New York, by way of the Southern District of New York, to the City of Detroit, in the State of Michigan, on and by its own railroads and the railroads of connecting carriers, under a common control, management and arrangement for a continuous carriage and shipment, and at all such times the said New York Central & Hudson River Railroad Company was a common carrier, subject to the provisions of an act of Congress, entitled "An Act to regulate commerce," approved February 4th, 1887, and of the acts amendatory thereof and supplemental thereto, and was engaged in the transportation over the said continuous line and route of many different kinds of freight and property in interstate commerce.

That at all the times herein mentioned the said New York Central & Hudson River Railroad Company and said connecting common carriers had jointly established and had filed with the Interstate Commerce Commission, as required by law, and had published a joint tariff of rates, fares and charges for the transportation of passengers and property in interstate commerce, which was in force at such times upon the said continuous line and route from the said City of New York to the said City of Detroit.

And the said tariff, so as aforesaid filed and published by the said railroad company plainly stated the places upon its railroad, and connecting lines, between which property and passengers would be carried and contained the classification of freight at said times in force.

That at all the times herein mentioned, the rates set forth in said joint tariff, so established, filed and published as aforesaid, from the said City of New York to the said City of Detroit, over the said continuous line and route, upon property of the character, kind and class hereinafter referred to, to wit, the sugars hereinafter mentioned, was twenty-three cents for each one hundred pounds thereof.

That at all the times herein mentioned, The American Sugar Refining Company was a corporation organized and existing under and by virtue of the laws of the State of New Jersey and The American Sugar Refining Company of New York was a corporation organized and existing under and by virtue of the laws of the State of New York.

That at all the times herein mentioned the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York were engaged in selling and in shipping under a common management large quantities of sugars over the lines of the various common carriers leading out of the said City of New York and State of New York, including the line and route established as aforesaid from the said City of New York to the said City of Detroit in the State of Michigan aforesaid; that at all the times herein mentioned, James Edgar (now deceased), C. Goodloe Edgar and Edwin Earle, were co-partners doing business in the said City of Detroit under the firm name of W. H. Edgar & Son, and were desirous of purchasing from the said The American Sugar Refining Company and the said The Ameri-

can Sugar Refining Company of New York, sugars to be shipped to them from the said City of New York, in the State of New York.

And the jurors aforesaid, on their oaths aforesaid, do further present that on the twenty-sixth day of April, in the year of our Lord, nineteen hundred and four, one Lowell M. Palmer and one Thomas P. Riley, as agents of and acting for and on account of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, induced the said New York Central & Hudson River Railroad Company, and its agents, Nathan Guilford and Fred L. Pomeroy, acting within the scope of th-ir authority as Traffic Manager and Assistant Traffic Manager, respectively, of the said railroad company, to enter into an unlawful agreement and arrangement with the said Lowell M. Palmer and the said Thomas P. Riley, as agents as aforesaid, whereby it was agreed that in the event of any of said sugars being shipped by the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York to the said W. H. Edgar & Son, over the line and route aforesaid from the City of New York to the City of Detroit, and in the event of the said consignors paying and procuring to be paid to the said New York Central & Hudson River Railroad Company, as common carrier, the full rates and charges named in said tariff as aforesaid, that is to say twenty-three cents for each one hundred pounds so shipped and transported, the New York Central & Hudson River Railroad Company would transport and cause to be transported said sugars over the said continuous line and route to the said City of Detroit and would grant and give a rebate and concession in respect of the transportation of said sugars as aforesaid to the said Lowell M. Palmer and Thomas P. Riley, as the agents of, and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York and the said W. H. Edgar & Son of five cents for each one hundred pounds of sugar so shipped and transported to the said City of Detroit, the said sum in such cases to be refunded from the lawful amounts paid as aforesaid, according to the said joint tariff of rates, fares and charges of twenty-three cents for each one hundred pounds of such shipments and transportations.

And it was also agreed by and between the said railroad company and the said Nathan Guilford and the said Fred L. Pomeroy and the said Lowell M. Palmer and the said Thomas P. Riley, acting as agents, respectively, as aforesaid, that thereafter upon any and all shipments and transportations of such sugars said Lowell M. Palmer and said Thomas P. Riley, as agents as aforesaid, should present claims to and upon the said railroad company for such rebates and concessions and that the same should be paid by the said railroad company in respect of the transportation of said sugars to the said Lowell M. Palmer and Thomas P. Riley, as agents of and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, thereby reducing the said tariff of twenty-

three cents for each one hundred pounds in and by the amount of five cents for each one hundred pounds as aforesaid.

And under the said unlawful agreement and arrangement, the said The American Sugar Refining Company of New York, on the respective dates enumerated below, during the months of April and May, in the year of our Lord nineteen hundred and four, delivered to the said New York Central & Hudson River Railroad Company for shipment and transportation over the continuous line and route aforesaid to said W. H. Edgar & Son, at the said City of Detroit, divers and various consignments of sugars, and the same were transported thereon and thereby to Detroit aforesaid, by way of the said continuous line and route by way of the Southern District of New
11 York, the said dates of shipment, the numbers of the way-bills and the number of pounds of sugar so shipped being respectively as follows:

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
April 26-04	956	32831
" 27-04	1078	35690
" 27-04	1079	35712
" 27-04	1080	36005
" 28-04	965	40400
" 29-04	983	36456
" 29-04	984	40683
" 30-04	1110	40400
" 30-04	1000	38119
May 2-04	1115	37682
" 2-04	1114	31391
" 3-04	1125	37747
" 3-04	1131	32450
" 3-04	1132	38105
" 3-04	1133	35657
" 3-04	1134	37948
" 4-04	1025	39775
" 4-04	1017	36680
" 4-04	1015	30145
" 4-04	1016	60265
" 4-04	1138	37220
" 4-04	1144	35752
" 4-04	1147	25645
" 4-04	1148	20200
" 4-04	1149	26600
" 5-04	1032	35419
" 5-04	1033	40461
" 5-04	1029	29528
" 5-04	1027	26818
" 5-04	1028	32860
" 6-04	1168	26109
" 6-04	1038	35368
" 6-04	1039	40400

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
May 6-04	1040	30300
" 6-04	1041	29758
" 6-04	1042	37774
" 6-04	1043	29643
" 7-04	1061	37431
" 7-04	1062	43819
" 7-04	1053	36447
" 7-04	1182	30742
" 7-04	1197	40400
" 10-04	1088	29454
" 10-04	1086	36864
" 10-04	1087	40400
" 10-04	1084	40400
" 10-04	1085	17558
" 10-04	1082	36144
" 10-04	1083	26968
" 10-04	1081	36251
" 11-04	1108	30763
" 11-04	1109	26044
" 12-04	1134	24553
" 12-04	1135	29747
" 12-04	1225	26600
" 12-04	1226	40400
12 May 12-04	1227	34548
" 12-04	1224	35674
" 13-04	1238	40400
" 13-04	1236	40400
" 13-04	1237	18361
" 13-04	1234	31983
" 14-04	1178	40400
" 14-04	1179	40400
" 14-04	1184	40400
" 14-04	1185	40400
" 14-04	1186	29665
" 14-04	1187	28932
" 14-04	1188	30300
" 14-04	1189	36764
" 14-04	1190	35419
" 12-04	1138	37157
" 16-04	1201	40400
" 17-04	1202	36127
" 17-04	1203	36211
" 18-04	1219	36293
" 19-04	1225	28959
" 19-04	1226	37007
" 19-04	1227	40400
" 20-04	1228	42179
" 20-04	1229	37037
" 23-04	1292	26600

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
May 23-04	1253	36372
" 23-04	1254	40400
" 23-04	1259	44775
" 27-04	1327	40400
" 27-04	1281	36533

And the regular rate of twenty-three cents for each one hundred pounds thereof, according to the joint tariff aforesaid, was duly paid according and pursuant to said agreement to the said railroad company, and thereafter, on July 14th, in the year of our Lord nineteen hundred and four, a claim for Fifteen hundred and twenty-four dollars and ninety-nine cents for rebate and concession in respect of said sugars transported as aforesaid, was presented by the said Lowell M. Palmer and Thomas P. Riley, as agents as aforesaid, to the said New York Central & Hudson River Railroad Company for payment.

That on the thirty-first day of August, in the year of our Lord nineteen hundred and four, the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, as agents and acting on behalf of said company, within the scope of their employment, at the Southern District of New York, and within the jurisdiction of this Court, paid and caused to be paid to the said Lowell M. Palmer, as agent of, and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, by way of rebate and concession, in respect of the transportation of said sugars under the said unlawful agreement and arrangement the said sum of Fifteen hundred and twenty-four dollars and ninety-nine cents for and on account of sugars actually so shipped and transported as aforesaid to the said City of Detroit.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, a corporation and common carrier, as aforesaid, and the said Nathan Guilford and Fred L. Pomeroy, its agents, as aforesaid, in manner and form and by the means aforesaid, at and in the said Dis-
13 trict and jurisdiction, on the said thirty-first day of August, in the year of our Lord nineteen hundred and four, unlawfully and willfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier, subject to said act to regulate commerce and the acts amendatory thereto whereby said property was transported at a less rate than that named in the joint tariffs aforesaid, published and filed by such carrier, as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Third Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating and incorporating and adopting and reaffirming the averments and allegations of the Second Count of this indictment, to wit, from the beginning thereof up to and including the following words of the said Second Count, namely, "thereby reducing said tariff of twenty-three cents for each one hundred pounds in and by the amount of five cents for each one hundred pounds, as aforesaid,") do further present and allege, that under the said unlawful agreement and arrangement, so as aforesaid mentioned and set forth in the Second Count hereof, the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, on the respective dates enumerated below, during the months of July and August, in the year of our Lord nineteen hundred and four, delivered to the said New York Central & Hudson River Railroad Company for shipment and transportation over the continuous line and route aforesaid, to the said W. H. Edgar & Son, at the said City of Detroit, divers and various consignments of sugars, and the same were transported thereon and thereby to Detroit aforesaid, by way of the said continuous line and route, by way of the Southern District of New York, the said dates of shipment, the numbers of the way-bills and the number of pounds of sugars so shipped being respectively as follows:

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
July 1-04	1525	34901
" 1-04	1526	10100
" 1-04	1520	37055
" 1-04	1519	39443
" 1-04	1529	10100
" 1-04	1525	36478
" 2-04	1542	37258
" 2-04	1540	36628
" 2-04	1541	37234
" 2-04	1538	37040
" 2-04	1539	36988
" 2-04	1527	37110
" 2-04	1536	36280
" 5-04	1549	40400
" 5-04	1550	32900
" 6-04	1554	40490
" 6-04	1555	37337
" 6-04	1561	40400
" 6-04	1562	36470
" 7-04	1572	40400
" 7-04	1573	44308
" 8-04	1577	22873
" 8-04	1578	36816
" 8-04	1584	58633
" 8-04	1586	37089

	Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
14	July 8-04	1587	36473
	" 8-04	1588	36621
	" 9-04	1589	40400
	" 9-04	1590	40400
	" 9-04	1591	37864
	" 9-04	1592	36401
	" 9-04	1593	36565
	" 9-04	1567	56752
	" 9-04	1568	50500
	" 9-04	1569	50500
	" 11-04	1601	36582
	" 11-04	1579	40400
	" 11-04	1602	36900
	" 12-04	1608	36485
	" 12-04	1609	36599
	" 13-04	1611	37217
	" 13-04	1615	36505
	" 13-04	1616	36214
	" 13-04	1617	37746
	" 14-04	1623	37700
	" 16-04	1611	32660
	" 16-04	1609	40400
	" 16-04	1610	40400
	" 18-04	1636	40400
	" 16-04	1608	40400
	" 16-04	1608	45911
	" 18-04	1615	13300
	" 18-04	1616	32600
	" 19-04	1624	40400
	" 20-04	1632	40400
	" 20-04	1633	20200
	" 21-04	1647	10100
	" 21-04	1648	27492
	" 27-04	1673	45036
	" 27-04	1672	42380
	" 27-04	1665	40400
	" 27-04	1675	40400
	" 28-04	1679	37504
	" 28-04	1680	32375
	" 28-04	1693	10100
	" 28-04	1679	43009
	" 29-04	1700	40400
	" 30-04	1708	30300
	" 30-04	1709	40400
	" 30-04	1710	40400
	" 8-04	1579	10100
	" 16-04	1634	35350
	" 16-04	1633	37272
	" 18-04	1865	13300

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Aug. 1-04	1702	40400
" 2-04	1707	51002
" 2-04	1706	50467
" 2-04	1737	40400
" 4-04	1725	36507
" 8-04	1746	36438
" 6-04	1765	40400
" 6-04	1763	40400
" 9-04	1755	32523
" 9-04	1756	28662
" 10-04	1779	40400
15 Aug. 10-04	1780	40400
" 6-04	1739	36314
" 11-04	1770	36130
" 11-04	1769	20200
" 11-04	1763	29347
" 11-04	1764	44681
" 13-04	1803	50500
" 13-04	1804	50500
" 13-04	1786	27841
" 13-04	1787	30398
" 11-04	1771	36206
" 15-04	1795	36360
" 17-04	1845	50500
" 17-04	1842	10100
" 17-04	1843	50500
" 20-04	1814	40400
" 20-04	1850	36705
" 20-04	1816	36772
" 22-04	1821	40400
" 22-04	1822	36458
" 23-04	1828	37505
" 23-04	1830	40400
" 23-04	1831	37054
" 24-04	1892	35935
" 24-04	1890	35655
" 24-04	1891	35781
" 24-04	1898	35830
" 24-04	1897	35824
" 25-04	1844	36522
" 25-04	1842	36716
" 25-04	1843	40400
" 26-04	1855	36737
" 26-04	1850	36896
" 26-04	1849	40400
" 27-04	1877	37562
" 27-04	1875	47075
" 27-04	1876	37208
" 27-04	1873	21895

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Aug. 27-04	1874	51874
" 27-04	1871	37294
" 27-04	1872	20200
" 27-04	1869	36782
" 27-04	1870	37486
" 27-04	1934	50500
" 29-04	1942	34838
" 29-04	1943	34993
" 30-04	1951	40400
" 30-04	1952	50500
" 30-04	1949	34696
" 30-04	1950	35246
" 30-04	1947	40400
" 30-04	1948	34707
" 30-04	1894	37140
" 30-04	1892	33767
" 30-04	1893	36683
" 30-04	1891	36830
" 30-04	1887	36719
" 31-04	1900	40400

16 And the regular rate of twenty-three cents for each one hundred pounds thereof, according to the joint tariff aforesaid, was duly paid according and pursuant to said agreement to the said railroad company, and thereafter, to wit, on the twenty-fourth day of August, in the year of our Lord, nineteen hundred and four, and on the twenty-third day of September, of the same year, respectively, claims for Eleven hundred and ninety-two dollars and sixteen cents and Twelve hundred and eighty-two dollars and thirty-eight cents, amounting in the aggregate to Twenty-four hundred and seventy-four dollars and fifty-four cents, for rebate and concession in respect of said sugars transported, as aforesaid, were presented by the said Lowell M. Palmer and the said Thomas P. Riley, as agents as aforesaid, to the said New York Central & Hudson River Railroad Company for payment.

That on the twenty-ninth day of October, in the year of our Lord nineteen hundred and four, the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, as agents and acting on behalf of said company within the scope of their employment, at the Southern District of New York, and within the jurisdiction of this Court, paid, and caused to be paid, to the said Lowell M. Palmer, as agent of, and for the benefit of, the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, by way of rebate and concession, in respect of the transportation of said sugars under the said unlawful agreement and arrangement, the said sum of Twenty-four hundred and seventy-four dollars and fifty-four cents for and on account of

the sugars actually so shipped and transported as aforesaid to the said City of Detroit.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, a corporation and common carrier, as aforesaid, and the said Nathan Guilford and the said Fred L. Pomeroy, its agents as aforesaid, in the manner and form and by the means aforesaid, at and in the said district and jurisdiction, on the said twenty-ninth day of October, in the year of our Lord nineteen hundred and four, unlawfully and willfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier, subject to said "Act to regulate commerce" and the acts amendatory thereto; against the peace of the United States and their dignity, and contrary to the form of the staute of the United States in such case made and provided.

Fourth Count.

And the jurors aforesaid, on their oaths aforesaid (in this count repeating and incorporating and adopting and reaffirming the averments and allegations of the Second Count of this indictment, to wit, from the beginning thereof up to and including the following words of the said Second Count, namely, "thereby reducing said tariff of twenty-three cents for each one hundred pounds in and by the amount of five cents for each one hundred pounds, as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement, as set forth in the said Second Count of this indictment, the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, on the respective dates enumerated below, during the month of September, in the year of our Lord nineteen hundred and four, delivered to the said New York Central & Hudson River Railroad Company, for shipment and transportation over the continuous line and route aforesaid, to the said W. H. Edgar & Son, at the said City of Detroit, divers and various consignments of sugars, and the same were transported thereon and thereby to Detroit aforesaid, by way of the said continuous line and route by way of the Southern tis-
17 trict of New York, the said dates of shipment, the numbers of the way-bills and the number of pounds of sugars so shipped, being respectively as follows:

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Sept. 1-04	1913	34790
" 1-04	1914	34850
" 1-04	1905	34846
" 1-04	1903	37356
" 1-04	1904	36582
" 1-04	1901	36276
" 1-04	1902	37098
" 3-04	1935	37758

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Sept. 3-04	1924	37814
" 3-04	1921	36914
" 3-04	1922	37920
" 3-04	1986	40400
" 3-04	1987	50500
" 3-04	1978	50500
" 6-04	1996	35315
" 6-04	1998	40400
" 7-04	1943	10100
" 7-04	1944	35577
" 8-04	1945	35284
" 8-04	2012	40400
" 9-04	2028	35630
" 9-04	2024	40400
" 9-04	2025	36125
" 9-04	2026	36298
" 9-04	2027	36317
" 9-04	1951	50500
" 10-04	2042	35469
" 10-04	2043	40400
" 10-04	2036	50500
" 10-04	2037	50500
" 10-04	2038	35540
" 10-04	2041	40400
" 10-04	2034	60600
" 10-04	2035	35603
" 10-04	1972	37820
" 10-04	1971	37214
" 10-04	1970	37023
" 10-04	1968	37082
" 10-04	1969	36376
" 10-04	1966	40740
" 10-04	1967	37467
" 10-04	1960	20200
" 10-04	1958	40400
" 10-04	1959	40400
" 12-04	2046	35288
" 12-04	2047	40400
" 12-04	2051	40400
" 13-04	1978	37184
" 13-04	1979	36059
" 13-04	1976	35839
" 13-04	1977	35737
" 14-04	1990	38070
" 15-04	1991	28208
" 15-04	1992	10100
" 15-04	2067	35466
" 15-04	2065	50500

	Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
18	Sept. 15-04	2066	45703
	" 16-04	2003	36192
	" 16-04	2004	36041
	" 16-04	2001	40400
	" 16-04	2002	50500
	" 16-04	1998	35795
	" 16-04	2072	35850
	" 16-04	2073	35509
	" 16-04	2074	35630
	" 16-04	2075	35898
	" 16-04	2076	40400
	" 16-04	2077	30300
	" 17-04	2091	36318
	" 17-04	2092	36142
	" 17-04	2089	36301
	" 17-04	2090	36241
	" 17-04	2087	40400
	" 17-04	2088	30300
	" 17-04	2035	40400
	" 17-04	2036	29860
	" 17-04	2027	40400
	" 17-04	2025	40400
	" 17-04	2026	35932
	" 17-04	2023	40400
	" 17-04	2024	30300
	" 17-04	2022	47175
	" 10-04	2095	35914
	" 3-04	1930	40400
	" 20-04	2103	60600
	" 19-04	2039	45685
	" 20-04	2043	40400
	" 21-04	2108	40400
	" 22-04	2060	38094
	" 22-04	2061	37926
	" 22-04	2062	40400
	" 22-04	2065	36205
	" 23-04	2121	50500
	" 23-04	2072	36644
	" 23-04	2073	37783
	" 23-04	2068	36440
	" 23-04	2067	35448
	" 24-04	2090	32878
	" 24-04	2091	49964
	" 24-04	2089	46203
	" 24-04	2081	10100
	" 24-04	2082	40400
	" 24-04	2079	22076
	" 24-04	2080	14992
	" 24-04	2078	37099

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Sept. 26-04	2097	30300
" 27-04	2144	10100
" 28-04	2098	30300
" 16-04	2000	40400
" 12-04	2044	40400
" 12-04	2045	35321

And the regular rate of twenty-three cents for each one hundred pounds thereof, according to the joint tariff aforesaid, was duly paid according and pursuant to said agreement to the said railroad company, and thereafter, to wit, on the twentieth day of October, in the year of our Lord nineteen hundred and four, a
19 claim for Twenty-one hundred and seventeen dollars and nineteen cents for rebate and concession in respect of the said sugars transported, as aforesaid, was presented by the said Lowell M. Palmer and the said Thomas P. Riley, as agents as aforesaid, to the said New York Central & Hudson River Railroad Company for payment.

That on the twenty-third day of November, of the same year, the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, as agents and acting on behalf of said Company, within the scope of their employment, at the Southern District of New York and within the jurisdiction of this Court, paid and caused to be paid to the said Lowell M. Palmer, the agent of, and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, by way of rebate and concession in respect of the transportation of such sugars under the said unlawful agreement and arrangement, the said sum of Twenty-one hundred and seventeen dollars and nineteen cents, for and on account of the sugars actually so shipped and transported as aforesaid to the said City of Detroit.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said New York Central & Hudson River Railroad Company, a corporation and common carrier, as aforesaid, and the said Nathan Guilford and the said Fred L. Pomeroy, its agents as aforesaid, in manner and form and by the means aforesaid, at and in the said district and jurisdiction, on the said twenty-third day of November, in the year of our Lord nineteen hundred and four, unlawfully and willfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce, by a common carrier subject to the said "Act to regulate commerce" and the acts amendatory thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Fifth Count.

And the jurors aforesaid, on their oath aforesaid (in this count repeating, incorporating and in all things adopting and reaffirming

the averments and allegations of the Second Count of this indictment, to wit, from the beginning thereof, up to and including the following words of the said Second Count, namely, "thereby reducing said tariff of twenty-three cents for each one hundred pounds, in and by the amount of five cents for each one hundred pounds, as aforesaid"), do further present and allege, that under the said unlawful agreement and arrangement, so as aforesaid mentioned and set forth in the Second Count hereof, the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, on the respective dates enumerated below, during the month of October, in the year of our Lord nineteen hundred and four, delivered to the said New York Central & Hudson River Railroad Company for shipment and transportation over the continuous line and route aforesaid, to the said W. H. Edgar & Son, at the said City of Detroit, divers and various consignments of sugars, and the same were transported thereon and thereby to Detroit aforesaid, by way of the said continuous line and route, by way of the Southern District of New York, the said dates of shipment, the numbers of the way-bills, and the number of pounds of sugars so shipped being respectively as follows, namely:

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Oct. 1-04	2117	44404
" 1-04	2118	38559
" 1-04	2171	10100
" 3-04	2128	40400
Oct. 3-04	2183	35998
" 3-04	2182	35847
" 4-04	2190	35912
" 4-04	2191	36178
" 5-04	2137	45211
" 5-04	2135	35883
" 5-04	2136	35870
" 5-04	2133	37419
" 6-04	2204	40400
" 6-04	2207	10100
" 6-04	2141	43790
" 6-04	2142	52869
" 7-04	2211	35937
" 7-04	2219	30300
" 11-04	2220	36254
" 7-04	2376	20200
" 7-04	2377	35855
" 7-04	2218	35878
" 8-04	2224	22609
" 8-04	2225	20200
" 7-04	2152	36321
" 7-04	2153	36306
" 7-04	2150	36617
" 7-04	2151	36438

	Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
	Oct. 7-04	2147	35825
	" 7-04	2148	30300
	" 7-04	2146	35730
	" 8-04	2171	30352
	" 8-04	2172	22632
	" 8-04	2169	10100
	" 8-04	2170	40400
	" 8-04	2167	36748
	" 8-04	2168	30300
	" 8-04	2118	24372
	" 8-04	2161	36160
	" 8-04	2162	36507
	" 8-04	2159	36493
	" 8-04	2160	40400
	" 8-04	2157	36377
	" 8-04	2158	36485
	" 8-04	2156	36559
	" 11-04	2186	15630
	" 11-04	2187	15696
	" 11-04	2184	43930
	" 12-04	2189	38106
	" 13-04	2201	38488
	" 13-04	2196	34311
	" 14-04	2254	30300
	" 14-04	2354	35671
	" 15-04	2223	20050
	" 15-04	2213	15544
	" 15-04	2214	36197
	" 15-04	2211	30300
	" 15-04	2212	20200
	" 15-04	2209	30300
	" 15-04	2210	30300
	" 15-04	2207	30300
	" 15-04	2208	30300
	" 18-04	2230	32380
21	Oct. 17-04	2277	36278
	" 17-04	2278	30300
	" 17-04	2226	30300
	" 17-04	2227	36224
	" 18-04	2285	35951
	" 19-04	2292	30300
	" 20-04	2298	36101
	" 21-04	2244	36807
	" 21-04	2306	36277
	" 22-04	2257	37016
	" 22-04	2255	37433
	" 22-04	2256	36759
	" 22-04	2247	36400
	" 22-04	2248	37400

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
Oct. 17-04	2278	30300
" 22-04	2249	37695
" 22-04	2250	22733
" 22-04	2251	15229
" 22-04	2252	36893
" 22-04	2315	26600
" 25-04	2264	44518
" 25-04	2265	25364
" 25-04	2266	40400
" 25-04	2268	36218
" 25-04	2269	30300
" 25-04	2327	36574
" 26-04	2334	30300
" 26-04	2335	30300
" 26-04	2270	37512
" 26-04	2271	29800
" 26-04	2278	10100
" 26-04	2279	35760
" 26-04	2280	30300
" 26-04	2283	36088
" 27-04	2292	30300
" 27-04	2290	35574
" 27-04	2291	30300
" 28-04	2301	33417
" 28-04	2299	30300
" 28-04	2300	34213
" 28-04	2297	35811
" 28-04	2298	30300
" 28-04	2295	35969
" 28-04	2296	36269
" 28-04	2293	35821
" 28-04	2294	36076
" 29-04	2357	35229
" 29-04	2309	35474
" 29-04	2310	26600
" 29-04	2307	30300
" 29-04	2308	30300
" 29-04	2305	39594
" 31-04	2317	35439
" 5-04	2199	40400
" 11-04	2238	50500
" 15-04	2264	30300
" 20-04	2235	39318

22 And the regular rate of twenty-three cents for each one hundred pounds thereof, according to the joint tariff aforesaid was duly paid according and pursuant to said agreement to the said railroad company, and thereafter, to wit, on the seventeenth day of November, in the year of our Lord nineteen hundred and

four, a claim for Nineteen hundred and seventy-one dollars and forty-four cents, for a rebate and concession in respect of said sugars transported, as aforesaid, was presented by the said Lowell M. Palmer and the said Thomas P. Riley, as agents as aforesaid, to the said New York Central & Hudson River Railroad Company, for payment.

That on the twenty-eighth day of December in the year last aforesaid, the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, as agents and on behalf of said Company, acting within the scope of their employment, at the Southern District of New York and within the jurisdiction of this Court, paid and caused to be paid to the said Lowell M. Palmer, the agent of, and for the benefit of the said Sugar Refining Companies, and the said W. H. Edgar & Son, by way of rebate and concession in respect of the transportation of such sugars under the said unlawful agreement and arrangement, the said sum of Nineteen hundred and seventy-one dollars and forty-four cents, for and on account of the sugars actually so shipped and transported as aforesaid, to the said City of Detroit.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said New York Central & Hudson River Railroad Company, a corporation and common carrier, as aforesaid, and the said Nathan Guilford and the said Fred L. Pomeroy, its agents as aforesaid, in manner and form and by the means aforesaid, at and in the said District and jurisdiction, on the said twenty-eighth day of December, in the year of our Lord nineteen hundred and four, unlawfully and willfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce, by a common carrier subject to the said "Act to regulate commerce" and the acts amendatory thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Sixth Count.

And the jurors aforesaid, on their oaths aforesaid, do further present, that at the times hereinafter mentioned the New York Central & Hudson River Railroad Company was, and still is, a railroad corporation duly organized under and existing by virtue of the laws of the State of New York, and engaged in the transportation of passengers, freight and property for hire over a continuous line and route from the City of New York in the State of New York, by way of the Southern District of New York, to the City of Detroit, in the State of Michigan, on and by its own railroads and the railroads of connecting carriers, under a common control, management and arrangement for a continuous carriage and shipment, and at all such times the said New York Central & Hudson River Railroad Company was a common carrier, subject to the provisions of an act of Congress entitled an "Act to regulate commerce," approved February 4th, 1887, and of the acts amendatory thereof and supplemental thereto, and was engaged in the transportation over the said continuous line and route of many different kinds of freight and property in interstate commerce.

That at all times during the month of June, A. D. 1904, the said New York Central & Hudson River Railroad Company and said connecting common carriers, had jointly established and had filed with the Interstate Commerce Commission, as required by law, and published a joint tariff of rates, fares and charges for the transportation of passengers and property in interstate commerce, which was
23 in force at said times upon the said continuous line and route from the said City of New York to the said City of Detroit.

And the said tariff, so as aforesaid filed and published by the said railroad company plainly stated the places upon its railroad and connecting lines between which property and passengers would be carried and contained the classification of freight at said times in force. That at all times during the said month of June, 1904, the rates set forth in said joint tariff so established, filed and published as aforesaid, from the said City of New York to the said City of Detroit, over the said continuous line and route, upon property of the character, kind and class hereinafter referred to, to wit, the sugars hereinafter mentioned, was twenty-one cents for each one hundred pounds thereof.

That at all the times herein mentioned "The American Sugar Refining Company" was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and "The American Sugar Refining Company of New York" was a corporation organized and existing under and by virtue of the laws of the State of New York.

That at all the times herein mentioned the said Sugar Refining Companies were engaged in selling and shipping under a common management, large quantities of sugars over the lines of various common carriers, leading out of the said City of New York and State of New York, including the line and route established as aforesaid, from the said City of New York to the said City of Detroit, in the State of Michigan aforesaid; that at all the times herein mentioned, James Edgar (now deceased), C. Goodloe Edgar and Edwin Earle, were co-partners, doing business in the said City of Detroit, under the firm name of W. H. Edgar & Son, and were desirous of purchasing from the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, sugars to be shipped to them from the said City of New York, in the State of New York.

And the jurors aforesaid, on their oaths aforesaid, do further present, that on the twenty-sixth day of April, in the year of our Lord nineteen hundred and four, one Lowell M. Palmer and one Thomas P. Riley, as agents of, and acting for and on account of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son induced the said New York Central & Hudson River Railroad Company, and its agents, Nathan Guilford and Fred L. Pomeroy, acting within the scope of their authority as Traffic Manager and Assistant Traffic Manager, respectively, of the said railroad company, to enter into an unlawful agreement and arrangement with the said Lowell M. Palmer and the said Thomas P. Riley, as agents aforesaid,

whereby it was agreed that in the event of any of said sugars being shipped by the said The American Sugar Refining Company and the said The American Refining Company of New York to the said W. H. Edgar & Son, over the line and route aforesaid, from the said City of New York to the said City of Detroit, and in the event of said consignors paying and procuring to be paid to the said New York Central & Hudson River Railroad Company, as common carrier, the full rates and charges named in said tariff as aforesaid, that is to say, twenty-one cents for each one hundred pounds so shipped and transported, the said New York Central & Hudson River Railroad Company would transport, and cause to be transported, said sugars over the said continuous line and route to the said City of Detroit, and would grant and give a rebate and concession in respect of the transportation of said sugars as aforesaid, to the said Lowell M. Palmer and the said Thomas P. Riley, as agents of, and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, of three cents for each one hundred pounds of sugar so shipped and transported to the said City of Detroit, the said sum in such case to be refunded from the lawful amounts paid as aforesaid, according to the said joint tariff of rates, fares and
24 charges of twenty-one cents for each one hundred pounds of such shipments and transportations.

And it was also agreed by and between the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, and the said Lowell M. Palmer and the said Thomas P. Riley, acting as agents, respectively, as aforesaid; that thereafter upon any and all shipments and transportations of such sugars the said Lowell M. Palmer and Thomas P. Riley, as agents as aforesaid, should present claims to and upon the said railroad company for such rebates and concessions, and that the same should be paid by the said railroad company in respect of the transportation of said sugars to the said Lowell M. Palmer and the said Thomas P. Riley, as agents of, and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, thereby reducing the said tariff of twenty-one cents for each one hundred pounds in and by the amount of three cents for each one hundred pounds as aforesaid.

And under the said unlawful agreement and arrangement the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, on the respective dates enumerated below, during the month of June, in the year of our Lord nineteen hundred and four, delivered to the said New York Central & Hudson River Railroad Company for shipment and transportation over the continuous line and route aforesaid to the said W. H. Edgar & Son, at the said City of Detroit, divers and various consignments of sugars, and the same were transported thereon and thereby to Detroit aforesaid, by way of the said continuous line and route, by way of the Southern District of New York,

the said dates of shipment, the numbers of way-bills and the number of pounds of sugar so shipped being respectively as follows:

Date of shipment.	No. of way-bills.	No. lbs. of sugar shipped.
June 3-04	1325	45306
" 3-04	1326	36971
" 3-04	1327	41940
" 3-04	1328	32059
" 3-04	1329	37208
" 3-04	1330	42211
" 4-04	1335	1705
" 6-04	1351	19332
" 6-04	1352	38314
" 9-04	1365	7215
" 10-04	1377	18294
" 10-04	1372	27802
" 17-04	1428	36470
" 17-04	1429	37319
" 17-04	1417	38718
" 18-04	1434	37774
" 18-04	1435	37272
" 20-04	1443	37449
" 20-04	1444	37156
" 21-04	1460	40400
" 21-04	1458	20200
" 22-04	1456	37346
" 22-04	1448	38338
" 22-04	1449	37097
" 22-04	1450	36881
" 22-04	1451	37495
" 24-04	1467	55690
" 25-04	1479	36271
" 25-04	1480	37696
25 " 25-04	1479	36534
" 25-04	1482	36491
" 27-04	1486	35566
" 27-04	1487	36488
" 27-04	1484	40400
" 27-04	1485	40400
" 28-04	1498	40400
" 28-04	1498	37200
" 28-04	1498	37085
" 29-04	1495	37034
" 29-04	1502	47643
" 30-04	1516	36361
" 30-04	1517	36260
" 30-04	1514	40400
" 30-04	1515	35764
" 30-04	1518	36667
" 25-04	1481	40400
" 25-04	1480	38279

And the regular rate of twenty-one cents for each one hundred pounds thereof, according to the joint tariff aforesaid was duly paid, according and pursuant to the said agreement, to the said railroad company, and thereafter, on the fifteenth day of August, in the year of our Lord nineteen hundred and four, a claim for Five hundred and thirty-nine dollars and forty cents for rebate and concession in respect of the said sugars transported as aforesaid, was presented by the said Lowell M. Palmer, and the said Thomas P. Riley, as agents, as aforesaid, to the said New York Central & Hudson River Railroad Company, for payment.

That on the fourteenth day of September, in the year last aforesaid, the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, as agents and on behalf of said company, acting within the scope of their employment, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid, to the said Lowell M. Palmer, as agent of, and for the benefit of the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, and the said W. H. Edgar & Son, by way of rebate and concession in respect of the transportation of said sugars under the said unlawful agreement and arrangement, the said sum of Five hundred and thirty-nine dollars and forty cents, for and on account of the sugars actually so shipped and transported as aforesaid, to the said City of Detroit.

And the jurors aforesaid, on their oaths aforesaid, do say that, the said New York Central & Hudson River Railroad Company, a corporation and common carrier as aforesaid, and the said Nathan Guilford and the said Fred L. Pomeroy, its agents as aforesaid, in manner and form and by the means aforesaid at and in the said district and jurisdiction, on the said fourteenth day of September, in the year of our Lord nineteen hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said "Act to regulate commerce" and the acts amendatory thereto, whereby said property was transported at a less rate than that named in the joint tariff aforesaid, published and filed by such carrier as required by said "Act to regulate commerce," and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

26 *Seventh Count.*

And the jurors aforesaid, on their oaths aforesaid (in this count repeating, incorporating, and in all things, adopting and reaffirming the averments and allegations of the Second Count of this indictment, to wit, from the beginning thereof up to and including the following words of the said Second Count, namely, "thereby reducing said tariff of twenty-three cents for each one hundred pounds, in and by the amount of five cents for each one hundred pounds as aforesaid"), do further present and allege, that, under the said unlawful agree-

ment and arrangement, so as aforesaid mentioned and set forth in said Second Count of this indictment, the said The American Sugar Refining Company and the said The American Sugar Refining Company of New York, from time to time, during the months of April and May, in the year of our Lord, nineteen hundred and four, delivered to the said New York Central & Hudson River Railroad Company for shipment and transportation over the continuous line and route aforesaid to the said W. H. Edgar & Son, at the said City of Detroit, divers and various consignments of sugars, and the same were transported thereon and thereby to Detroit aforesaid, by and on the said continuous line and route, by way of the Southern District of New York, in due course of business; and the regular rate of twenty-three cents for each one hundred pounds of said sugars, according to the joint tariff aforesaid, was duly paid according and pursuant to said agreement and arrangement, on each and every of the said shipments, to the said railroad company; and thereafter, and pursuant to said agreement and arrangement on the fourteenth day of July, of the same year, a claim for Two hundred and eighty-five dollars and seventy-one cents, for rebate and concession in respect of the said sugars transported as aforesaid, was presented by Lowell M. Palmer and Thomas P. Riley, as agents as aforesaid, to the said New York Central & Hudson River Railroad Company, for payment.

That on the twentieth day of September, of the same year, the said New York Central & Hudson River Railroad Company and the said Nathan Guilford and the said Fred L. Pomeroy, as agents, and acting on behalf of said company, within the scope of their employment, at the Southern District of New York, and within the jurisdiction of this Court, paid, and caused to be paid, to the said Lowell M. Palmer, the agent of, and for the benefit of, the said Sugar Refining Companies, and the said W. H. Edgar & Son, by way of rebate and concession in respect of the transportation of such sugars under the said unlawful agreement and arrangement, the said sum of Two hundred and eighty-five dollars and seventy-one cents, for and on account of the sugars actually so shipped and transported, as aforesaid, to the said City of Detroit.

And so the jurors aforesaid, on their oaths aforesaid, do say that the said New York Central & Hudson River Railroad Company, a corporation and common carrier as aforesaid, and the said Nathan Guilford and the said Fred L. Pomeroy, its agents as aforesaid, in the manner and form and by the means aforesaid, at and in the said district and jurisdiction, on the said twentieth day of September, in the year of our Lord nineteen hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier, subject to the said "Act to regulate commerce" and the acts amendatory thereto; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

HENRY L. STIMSON,
United States Attorney.

27 (Endorsed:) U. S. Circuit Court.—The United States of America, *vs.* The New York Central & Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy.—Indictment. Offering, Granting and giving rebate and concession in interstate Commerce. 32 Stat. L. 847.—Henry L. Stimson, U. S. Attorney.—A True Bill, Robert N. Bolton, Foreman.—U. S. Circuit Court, Southern District New York, Filed May 4, 1906, John A. Shields, Clerk.

May 9, 1906. Defts. plead not guilty with leave to withdraw on 21st inst.
June 29, 1906. Demurrer argued.
July 26, 1906. Demurrer overruled etc.
July 30, 1906. Pomeroy gives bail $10,000.
Sept. 17, 1906. Pomeroy pleads not guilty.
Sep. 17, 1906. Albert H. Harris, Atty. appears and pleads not guilty on behalf of N. Y. C. & H. R. R. R. Co.
Sep. 17, 1906. Albert H. Harris, Atty. files Affit. & Power of Atty. and pleads not guilty on behalf of Nathan Guilford.
Oct. 15, 1906. Trial begun. Oct. 16, 1906. Trial Continued.
Oct. 17, 1906. Verdict guilty on 2, 3, 4, 5, 6, 7 counts.
Oct. 19, 1906. N. Y. C. & H. R. R. R. Co. to pay a fine of $18,000. on each count, total $108,000.00.
Oct. 19, 1906. Pomeroy to pay a fine of $1,000.00 each count Total $6,000.00.
Oct. 19, 1906. Stay of sixty days to perfect appeal.
Oct. 19, 1906. Stay of sixty days of execution of judgment.

28 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, NATHAN GUILFORD, and FRED L. POMEROY.

Offering, &c., Rebates (32 Stat. L. 847).

And the said The New York Central and Hudson River Railroad Company cometh into Court here, and having heard the said indictment read, says that the same, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law, and that it the said defendant company is not bound by the law of the land to answer the same; and this it is ready to verify.

And for specific and special causes of demurrer to the said indictment the said defendant company assigns the following objections thereto:

1. The acts described and set forth therein do not constitute a crime under the laws of the United States.

2. The acts described and set forth in the first count thereof do not constitute a crime under the laws of the United States.

3. The acts described and set forth in the second count thereof do not constitute a crime under the laws of the United States.

4. The acts described and set forth in the third count thereof do not constitute a crime under the laws of the United States.

5. The acts described and set forth in the fourth count thereof do not constitute a crime under the laws of the United States.

6. The acts described and set forth in the fifth count thereof do not constitute a crime under the laws of the United States.

7. The acts described and set forth in the sixth count thereof do not constitute a crime under the laws of the United States.

8. The acts described and set forth in the seventh count thereof do not constitute a crime under the laws of the United States.

9. The second count of the said indictment does not aver the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to afford the said defendant company full notice of the charge and enable it to make its defense with reasonable knowledge and ability.

10. The third, fourth, fifth, sixth and seventh counts of the said indictment are similarly deficient and defective in respect to averments of the time, place, nature and circumstance of the offense therein sought to be charged.

Wherefore, for want of a sufficient indictment in this behalf, the said defendant company prays judgment, and that by the court it may be dismissed and discharged from the said premises in the said indictment specified.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By NATHAN GUILFORD, *Vice-President.*

29 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Nathan Guilford, being duly sworn, deposes and says that he is an officer of the defendant company above named, to wit, one of its vice-presidents; that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact, as he is advised by counsel and verily believes.

NATHAN GUILFORD.

Subscribed and sworn to before me this 19th day of May, 1906.

ALBERT B. QUENCER,
[SEAL.] *Notary Public, N. Y. County.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HARRIS,
AUSTEN G. FOX,
JOHN D. LINDSAY,
Of Counsel for the said Defendant Company.

(Endorsed:) Circuit Court of the U. S., Southern District of N. Y.—The United States of America, against The New York Central and Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy.—Demurrer.—U. S. Circuit Court, Southern District New York, Filed May 22, 1906, John A. Shields, Clerk. Within demurrer overruled. See opinion filed. July 6, 1906. G. C. H.

30 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and NATHAN GUILFORD.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, NATHAN GUILFORD, and FRED S. POMEROY.

UNITED STATES
vs.
NATHAN GUILFORD, FRED L. POMEROY, C. GOODLOE EDGAR, and EDWIN EARLE.

Henry L. Stimson, U. S. Attorney.

William S. Ball, J. Osgood Nichols, and Henry A. Wise, Assistant U. S. Attorneys for the United States.

Austen G. Fox and John D. Lindsay, for the defendants, the New York Central &c. Co., Nathan Guilford and Fred L. Pomeroy.

Michael H. Cardoza and Howard S. Gans for the defendants C. Goodloe Edgar and Edwin Earle.

These are demurrers to four indictments. The indict-
31 ments are based on alleged violations of the Act to Regulate Commerce passed February 4, 1887, commonly called the Inter State Commerce Act, and the various acts amending and supplementing it, including the Act of February 19, 1903, commonly called the Elkins Act. Three of the indictments charge a giving or taking of rebates in violation of such act, and one a conspiracy to commit an offense against the United States by inducing the giving and taking of a rebate in violation of such act. The demurrers were argued at the same time and will be considered together.

The indictment against the New York Central and Hudson River Railroad Company contains two counts. The first count charges in substance that the defendant was a railroad corporation engaged in the transportation of freight for hire over its own and connecting

roads, between among other points, New York and Cleveland, Ohio; that its freight schedule, published as required by the Interstate Commerce Act, fixed the rate for freight on sugar from New York to Cleveland at 21 cents per 100 pounds; that on November 20, 1902, the officers of the American Sugar Refining Company, a New Jersey corporation induced the defendant to enter into the unlawful agreement to allow the sugar company a rebate of 5 cents per 100 pounds on sugar shipped by it to Cleveland for reconsignment to further points, and 4 cents per 100 pounds on sugar shipped to Cleveland to go no further; that the sugar company shipped various consignments of sugar under said agreement over defendants road and con-
32 necting roads to Cleveland and paid the schedule rate of 21 cents per 100 pounds; that afterwards claims for rebate on said shipments were presented by the Sugar Company to the defendant, upon which on April 2, 1903 the defendant paid to the Sugar Company by way of rebate $26,141.81. The Second count is substantially the same as the first except that the allegations of a preliminary agreement to pay rebates is omitted. The demurrer to this indictment alleges in substance that the acts set forth in the indictment and in each count thereof do not constitute a crime under the laws of the United States and that the indictment is not sufficiently definite and certain.

The principal objection to this indictment urged by the defendant's counsel is that the charge made in both counts that an unlawful discrimination was made in favor of the Sugar Company against other persons, is not sufficiently pleaded because no other person is named who was charged a larger rate, and reliance is put on the case of United States *v.* Hanley, 71 Fed. Rep. 672. In that case it was held in substance that the Interstate Commerce Act prohibited discriminations in rates between shippers and also deviations from the schedule rates; that if an indictment was based on alleged discriminations between different shippers it was not enough to show that a particular shipper was charged less than the scheduled rate but the indictment must allege that some other person designated in the indictment had been charged a higher rate. The Court held that as the Company might make an equal reduction to
33 everybody from the scheduled rate, an allegation that a rebate from the scheduled rate had been returned to a particular shipper was not a sufficient allegation of an unlawful discrimination. If it were necessary to base the decision of this demurrer upon this point, I should hesitate to follow the decision in United States *v.* Hanley. I think that if a railroad company receives from a shipper the full schedule rate, and then repays him a percentage of the amount paid as a rebate, there is weighty ground to hold that it is presumptively guilty of illegal discrimination under the act, and that if in fact the railroad company has pursued the extremely improbable course of making an uniform reduction of its rates to everybody while retaining a higher rate on its published schedules no substantial injustice will be done any defendant if he is left to prove that fact as part of his defense. But without passing definitely upon this question it is sufficient to say that the

case of United States *v.* Hanley also held that the payment of a rebate from the scheduled rates violated the provisions of the act prohibiting deviations from the published rates. The allegations of this indictment certainly support that charge sufficiently. In my opinion the indictment is sufficiently definite and specific and I think the demurrer to it should be overruled.

The indictment against the New York Central and Hudson River Railroad Company and Nathan Guilford charges in substance that at all the times stated in the indictment the Railroad Company's scheduled rate on sugar from New York to Detroit, Michigan, was 23 cents per 100 pounds; that the defendant Guilford was the defendant's traffic manager; that on October 15, 1902, Lowell M. Palmer and Thomas P. Riley, acting as agents of the American Sugar Refining Company and of the firm of W. H. Edgar & Son of Detroit, induced the Railroad Company and Guilford to agree to pay a rebate of 2 cents per 100 pounds on all sugar shipped by the Sugar Company to Edgar & Son; that shipments were thereafter made and the scheduled rates paid; that thereafter on May 14, 1903 the defendants paid to said Palmer as such agent $920.39 as a rebate. The grounds of demurrer to this indictment are that it is insufficient in law and that the acts set forth in it do not constitute a crime. The objections urged in its support by counsel are that it does not properly allege that any discrimination resulted; that it does not allege any wilful failure by the Railroad Company to observe the published tariff; and that the individual defendant is improperly joined with the corporation. The point of failure to properly allege discrimination I have already discussed under the first indictment considered; the fact that the indictment alleges that the full schedule rate was first paid to the Railroad Company and that thereafter $920.39 was paid by the defendants to Palmer as agent for the shippers "by way or rebate and concession in respect to the transportation of said sugars under said unlawful agreement" is in my opinion a sufficient allegation that the payment was a wilful failure to observe the published tariff; and as the Interstate Commerce Act as amended and the Elkins Act provide that the corporation and its agents may be criminally liable for giving rebates I do not see why these defendants cannot be prosecuted for the same offense in one indictment. I think therefore that the demurrer to the indictment against the Railroad Company and Guilford should be overruled.

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The indictment against the New York Central and Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy is in substance similar to the one against the Railroad Co. and Guilford and the objections taken to it in the demurrer and the agreement of counsel are similar to the objections taken to the indictment in that case. I think therefor- that the demurrer to this indictment should be overruled.

The indictment against Nathan Guilford, Fred L. Pomeroy, C. Goodloe Edgar and Edwin Earle, differs essentially from the three other indictments. It is an indictment for an alleged conspiracy under Section 5440 of the United States Revised Statutes. This

indictment charges in substance that the New York Central and Hudson River Railroad Company was engaged in the transportation of freight for hire over an interstate route to Detroit, Michigan, by its own and connecting lines; that it had published a schedule of rates over this route, under the Interstate Commerce Laws; that the rate for sugar from New York to Detroit was 23 cents per 100 pounds;
36 that the American Sugar Refining Company and the American Sugar Refining Company of New York were corporations engaged in selling and shipping sugar from New York over said route; that the defendants Edgar and Earle with one James E. Edgar now deceased, were a firm doing business in Detroit under the style of W. H. Edgar and Son; that the defendants Guilford and Pomeroy were traffic managers of the Railroad Company; that Palmer and Riley were agents both for the Sugar Companies and for Edgar & Son; that on April 1, 1904, at the Southern District of New York, the said Guilford, Pomeroy, James Edgar, C. Goodloe Edgar and Earle, with other persons to the jurors unknown, conspired with each other and with said Palmer and Riley to commit an offense against the United States by causing and procuring the said Railroad Company to give rebates on sugar shipped by the Sugar Companies at New York to Edgar & Son at Detroit over the said route; that it was agreed by said conspirators that a rebate should be given on such shipments of 5 cents per 100 pounds; that sugars were so shipped, the carriage paid for at the scheduled rates, claims made for rebates, and the rebates paid by said Guilford and Pomeroy acting in behalf of said Railroad Company to said Palmer and Riley acting in behalf of said Sugar Companies and Edgar & Son. The indictment also alleges as acts done to effect the object of the conspiracy that a letter was written by Pomeroy to Palmer stating the details of the agreement for rebates; that in July and August 1904 Edgar & Son purchased certain sugars from the Sugar Companies which Palmer
37 and Riley caused to be shipped to them at Detroit and paid for at the tariff rates; and that subsequently claims for rebates were presented and certain checks paid for such rebates, one check for $2,474.54 dated October 25, 1904 and one for $1,979.64 dated October 29, 1904.

Various objections under the demurrer are taken to this indictment. In my opinion the most serious of these objections is the claim that Congress having by the Elkins Act expressly abolished imprisonment as a penalty for any offense committed under the Acts to regulate Commerce, an indictment will not lie for a conspiracy to commit such an offense which is an offense punishable by imprisonment.

Section 5440 of the United States Revised Statutes, under which this indictment is brought, provides as follows:

"If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and when one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the Court."

The 10th section of the Interstate Commerce Act as amended, previous to the Elkins Act, provided that any common carrier, or, when it was a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for such corporation,
who should be convicted of the offense of an unlawful dis-
38 crimination in rates should be liable to a fine not to exceed $5,000 or to imprisonment not exceeding two years or both. Any such carrier or person who by false billing, classification, weighing or other device should wilfully assist or willingly permit any person to obtain transportation for property at less than the regular rates should be subject to the same punishment or fine and imprisonment. False billing by shippers or inducing carriers to discriminate unjustly was subject to the same punishment. But the Elkins Act passed in 1903, abolished the punishment of imprisonment in such cases, and substituted for it a heavier fine than that authorized by the Interstate Commerce Act. The punishment for the wilful failure of a carrier to file and publish the rates required by the Act was made a fine of not less than $1,000 and not more than $20,000. It was made unlawful for any person or corporation to offer, grant or give, or to solicit, accept or receive any rebate concession or discrimination, and the same punishment was fixed, a fine not less than $1,000 and not more than $20,000. The Act then provides as follows:

"In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

39 Section 4 of the Act also provides "that all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed."

It is impossible to deny that Congress intended in the Elkins Act to abolish the penalty of imprisonment for the offense of giving or taking rebates and to substitute for the previous punishment a much heavier fine than that which could be inflicted under the Interstate Commerce Act. If therefore the offense charged in this indictment is essentially the same offense as that created and punished in the Interstate Commerce Acts and the Elkins Act, this indictment in my opinion cannot be maintained. If Congress has made a certain action an offense and prescribed its punishment, the Courts cannot, by giving it some other name, increase the punishment. The question in this case therefore is whether the offense charged in the indictment as constituting the crime of conspiracy differs from the offense described in the Interstate Commerce Acts and the Elkins Act as the giving and receiving of rebates punishable by a fine.

In most cases, undoubtedly, a conspiracy to commit a crime is a distinct offense from the commission of the crime itself. This is true, of course, of all crimes committed by one person, for two persons at least are necessary for a conspiracy. Even if more than one person commits the crime there may be others engaged in a con-

spiracy to have it committed who do not take part otherwise in the commission of the crime. But there are certain crimes which
40 require for their commission the concurrent action and co-operation of more than one person. Such crimes as rioting, or duelling or bigamy, for instance, cannot be perpetrated by one person, and persons who do not perpetrate them might take part in a conspiracy to cause them to be done. But when the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult to claim that their agreement to act is in law a conspiracy, and their act, a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it. The claim that the agreement to give it is a conspiracy punishable by imprisonment, while the actual giving it is an offense only punishable by a fine seems to me too subtle a distinction to be drawn in the administration of criminal law.

This view is not without authority to support it. In each of the cases of Shannon *v.* Commonwealth, 14 Penn. 226, and in Miles *v.* State, 56 Alabama, 390, a man and woman were indicted for a conspiracy to commit adultery with each other. It was held in each case that the conspiracy was the same thing as the substantive offense and the indictments were quashed.

41 Wharton, in commenting on these cases, says:

"When the law says a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name, it is not lawful for the prosecution to call it by some other name; and when the law says such an offense—*e. g.* adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable, and hence, persons combining to induce others to commit bigamy, adultery, incest or duelling do not fall within this exception, and may be indicted for conspiracy." (Wheaton's Crim. L. Sec. 1339.)

In Regina *v.* Boulton, 12 Cox. Cr. C. 93, Chief Justice Cockburn says:

"I am clearly of the opinion that when the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiracy to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused. The prosecutors are thus enabled to combine in one indictment a variety of offenses, which, if treated individually, as they ought to be, would exclude the possi-
42 bility of giving evidence against one defendant to the prejudice of others."

In United States *v.* Dietrich and Fisher, 126 Fed. Rep. 664 the

indictmentc charged that the defendants entered into a conspiracy to commit an offense against the United States, by agreeing that Dietrich, a member of Congress, should procure the appointment of Fisher as postmaster, and that Fisher should pay to Dietrich therefor a certain sum of money as a bribe. The Court held that the indictment was bad, and, in the opinion, said:

"The making of such an agreement is not a conspiracy within the terms of Section 5440, but is a several and substantive offense under Section 1781 upon the part of each of the parties, and this without the doing of any overt act in pursuance thereof. * * * As the transaction is stated in the indictment it was Dietrich who agreed to accept the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to a federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services or aid in securing such an appointment. * * * The agreement or transaction stated in the indictment was immediately and
43 only between two persons, one charged with the intended taking and the other with the intended giving of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses defined in Section 1731, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of acquiring, receiving or giving. * * * Because concert and plurality of agents, in the sense we have hereinbefore shown, are essential to each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in this indictment do not constitute a conspiracy under Section 5440."

And see Chadwick *v.* United States, 141 Fed. Rep. 225, 236, where the Dietrich case is cited with approval.

The counsel for the Government assert that the Dietrich case is to be distinguished from this case because in the Dietrich case but two persons, the giver and taker of the bribe, were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named and others to the jurors unknown were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and
44 Pomeroy represent simply the giver and Edgar and Earle simply the receiver of the rebate. The Government's counsel also claims that the bribery statute makes agreeing to give or receive a bribe an offense while the statutes prohibiting rebates does not in terms prohibit an agreement to give or receive a rebate. But they do prohibit an offer of a rebate or the solicitation of a rebate; and when such an offer or solicitation is acceded to by the opposite

party, which the indictment alleges occurred in this case, an agreement is entered into. In short the Dietrich case seems to me, in its essential nature, strictly analogous to this case. The facts alleged in the indictment in the case at bar as steps taken to effect the object of the conspiracy are the same facts which it would be necessary to prove to sustain an indictment for giving and receiving rebates. On the trial of such an indictment the government would not make out a case by simply proving the payment of the check. It would have to prove that the check was given in payment of a rebate. To establish that proposition it would be necessary to prove the agreement to give a rebate, the shipment of sugars, the payment of the full scheduled rates of freight, the filing of the claims for rebate, and the payment of such claims as rebate, Without proof of these facts these defendants could not be convicted of the crime of giving or taking rebates; with such proof, they could. They would thereupon be liable to be punished by the fines prescribed by the Elkins Act and by no other punishment, and especially not by im-
45 prisonment, which penalty for such a crime is specifically abolished by the Elkins Act. In my opinion, it is not in the power of the Government, by calling the same acts a conspiracy, to indict these defendants for a different crime, and to thereby subject them to the liability of imprisonment for acts for which such punishment was expressly abolished by the Elkins Act.

Since writing this opinion my attention has been called to an act to amend the act to regulate commerce and all acts amendatory thereof, which was approved on June 29, 1906, the day on which these demurrers were argued. That act amends Section 1 of the Elkins Act by striking out the provision abolishing the punishment of imprisonment for offenses under the Acts to regulate Commerce, and inserting in lieu thereof a provision "that any person, or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment in the discretion of the court." This provision, upon general principles, and by the express terms of the 10th section of the act is not retrospective, and does not make any person liable to the punishment of imprisonment for such offenses committed before the passage of the recent act; but it
46 authorizes the inference that in the opinion of Congress, without such an amendment, no punishment by imprisonment for such offenses could be imposed.

My conclusion is that the demurrers to the three indictments for giving or receiving rebates should be overruled, and the demurrer to the indictment for conspiracy should be sustained.

G. C. H.

(Endorsed:) Circuit Court of the United States, For the Southern District of New York.—United States *vs.* New York Central and

Hudson River Railroad Company (and three other cases)—Opinion, Holt, J.—U. S. Circuit Court, Southern District New York, Filed Jul- 6, 1906, John A. Shields, Clerk.

47 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on the 26th day of July, in the year of our Lord one thousand nine hundred and six.

Present: Hon. Chas. M. Hough, District Judge.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, NATHAN GUILFORD, and FRED L. POMEROY.

The above-entitled cause coming on to be heard upon the demurrer to the indictment filed on the 22nd day of May, A. D., 1906, and being argued pro and con by counsel for the respective parties, on the 29th day of June of the same year, upon the issues of law joined therein, the Court was of the opinion that the said demurrer should be overruled, and the said opinion, in writing, was filed in the Clerk's Office of the said Court on the 6th day of July, in the year of our Lord one thousand nine hundred and six.

Now, therefore, on motion of Henry L. Stimson, Attorney for the United States, it is

Ordered, Adjudged and Decreed, that the said demurrer, pursuant to and in accordance with the said opinion, be, and the same is hereby overruled, with leave to the defendants, and each of

48 them, to plead over, which they are required to do, at a Special Session of said Court, to be held on the seventeenth day of September, 1906, in the New York Court House and Post Office Building.

CHAS. M. HOUGH,
U. S. Dist. Judge, Holding Circuit Court.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—The United States of America *vs.* The New York Central & Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy.—Order.—Henry L. Stimson, United States Attorney, Attorney for United States.—U. S. Circuit Court, Southern District New York, Filed Jul- 26, 1906, John A. Shields, Clerk.

49 TUESDAY, *October* 16*th*, 1906.

The Court meets and is opened by proclamation.

Present: The Hon. Geo. C. Holt, Judge.

E 4220. Trial Continued.

U. S.
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY and FRED L. POMEROY.

Jurors Sworn.

1. Edmund B. Taylor
2. Charles Z. Newell
3. John A. Patterson
4. Egbert Mills
5. Eugene Lewis
6. Jas. Timpson
7. Charles S. Newman
8. Mortimer B. Newman
9. Jos. F. Tweed
10. George E. Godward
11. William Tonk
12. John J. Fish

Evidence on Behalf of Prosecution.

George T. Roberts sworn.
Fred L. Hurst "
Lowell M. Palmer "
Arthur B. Holmes "
William F. Wilson "
William F. Boardman "
Jas. S. Trelor "
Harry T. Leeming "

Adj'd to Oct. 17th, 1906.

50 WEDNESDAY, *October* 17*th*, 1906.

The Court meets and is opened by proclamation.

Present: The Hon. Geo. C. Holt, Judge.

No. E 4220. Trial Continued.

U. S.
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD and FRED L. POMEROY.

Evidence on behalf of prosecution continued.

Allen McMichael sworn.

Government rests.

Motion to acquit F. L. Pomeroy made by J. D. Lindsay. Denied.

Motion to direct a verdict acquitting the New York Central & Hudson River Railroad Company, made by A. G. Fox. Motion denied.

On motion of U. S. Attorney Ordered First Count of Indictment withdrawn.

The charge is thereupon delivered by the Court to the jurors who retire in charge of an officer duly qualified to attend them, and upon their return say they find the defendants guilty on the Second, Third, Fourth, Fifth Sixth and Seventh Counts of indictment.

Motions to set aside verdict etc., adjourned to October 19th, 1906.

51 FRIDAY, *October 19th*, 1906.

The Court meets and is opened by proclamation.

Present: The Honorable George C. Holt, Judge.

UNITED STATES
vs.
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, FRED L. POMEROY, Impleaded.

E. 4220. Offering, Granting and Giving Rebate and Concession in Interstate Commerce, 32 Stat. L., 847.

Austin G. Fox, Esq., on behalf of the N. Y. Central & Hudson River Railroad Company moves to set aside and vacate the verdict and for a new trial Motion denied.

John D. Lindsay, Esq., on behalf of the defendant Fred L. Pomeroy, makes like motion. Motion denied.

United States Attorney moves for sentence in the case against the New York Central & Hudson River Railroad Company. So Ordered, and the New York Central & Hudson River Railroad Company having been duly called was asked why sentence of the Court should not be passed upon it according to law.

Mr. Fox on behalf of the New York Central & Hudson River Railroad Company moves for an arrest of judgment. Motion denied.

United States Attorney moves for sentence in the case against Fred L. Pomeroy. So Ordered and the defendant Fred L. Pomeroy having been duly called was asked why sentence of the court should not be passed upon him according to law.

Mr. Lindsay on behalf of Fred L. Pomeroy moves for an arrest of judgment. Motion denied.

52 The Court thereupon proceeds to pass judgment and sentence defendant Fred L. Pomeroy to pay a fine of One Thousand Dollars on each of the six counts, making in all the sum of Six Thousand Dollars.

The Court thereupon proceeds to pass judgment and sentence the defendant New York Central & Hudson River Railroad Company to pay a fine of Eighteen Thousand Dollars on each of the six counts, making in all the sum of One Hundred and Eight Thousand Dollars.

Mr. Fox moves for a stay of sixty days within which to perfect an appeal, and for a stay of sixty days of execution of judgment, on behalf of the N. Y. Central & Hudson R. R. Co. Motion granted.

Mr. Lindsay moves for a stay of sixty days within which to perfect an appeal, and for a stay of sixty days of execution of judgment on behalf of the defendant Fred L. Pomeroy. Motion granted.

53 Circuit Court of the United States, Southern District of New York, in the Second Circuit, October Term, 1906.

UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Impleaded with NATHAN GUILFORD and FRED L. POMEROY.

Bill of Exceptions.

The issues in this action came on for trial at a stated term of this court begun and held in the City of New York within and for the District and Circuit aforesaid on the 10th day of October, 1906, and continued by adjournment to and including the 15th day of October, 1906, before the Honorable George C. Holt, one of the United States District Judges for the Southern District of New York, who had been theretofore duly assigned to hold the said term.

The Government appeared by Henry L. Stimson, Esquire, Attorney for the United States for the District aforesaid, and Henry A. Wise, Esquire, Assistant United States Attorney. The defendants appeared by Albert H. Harris, Esquire, their attorney of record. Austen G. Fox, Esquire, appeared as counsel for the defendant corporation, and John D. Lindsay, Esquire, appeared as counsel for the defendants Guilford and Pomeroy.

The Government having moved the case for trial, each of the defendants moved for a separate trial. The motion was granted as to the defendant Guilford and denied as to the others. The trial thereupon proceeded as to the defendants The New York Central and Hudson River Railroad Company and Fred L. Pomeroy
54 only.

The defendant The New York Central and Hudson River Railroad Company thereupon moved for an order quashing and dismissing the indictment upon each of the following grounds:

1. The acts described and set forth therein do not constitute a crime under the laws of the United States.

2. The acts described and set forth in the first count thereof do not constitute a crime under the laws of the United States.

3. The acts described and set forth in the second count thereof do not constitute a crime under the laws of the United States.

4. The acts described and set forth in the third count thereof do not constitute a crime under the laws of the United States.

5. The acts described and set forth in the fourth count thereof do not constitute a crime under the laws of the United States.

6. The acts described and set forth in the fifth count thereof do not constitute a crime under the laws of the United States.

7. The acts described and set forth in the sixth count thereof do not constitute a crime under the laws of the United States.

8. The acts described and set forth in the seventh count thereof do not constitute a crime under the laws of the United States.

9. The second count of the said indictment does not aver the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to afford the said defendant company full notice of the charge and enable it to make its defense with reasonable knowledge and ability.

10. The third, fourth, fifth, sixth and seventh counts of the said indictment are similarly deficient and defective in re-
55 spect to averments of the time, place, nature and circumstances of the offense therein sought to be charged.

11. A joint indictment will not lie against a corporation and its servants and agents for doing the same act.

12. The Act of February 4, 1887, entitled "An Act to Regulate Commerce" and the Act of February 19, 1903, entitled "An Act to further regulate commerce with foreign nations and among the states" are unconstitutional and void in that they seek to subject interstate common carriers engaged in the transportation of passengers and property between places in different states wholly by rail or partly by rail and partly by water, to regulations and restrictions including penalties and punishment not imposed upon carriers engaged in the transportation of passengers and property between the same places wholly by water, and thereby deny to the defendant corporation the equal protection of the law, the point of this objection being that between the City of New York and Detroit there is a route of transportation, which is an interstate route, wholly by water, with which the corporation was prevented from competing by the provisions of the Acts referred to because this wholly water route was not subject to the regulations of the Interstate Commerce Law.

13. The Act of February 19, 1903, which is sometimes called the Elkins Act, is unconstitutional and void in that it undertakes to make corporations punishable by fine for the acts of its agents in which such corporations are incapable in law of participating, and thereby undertakes to subject the innocent stockholders of such corporations, who take no part in such acts to punishment without due process of law.

14. The Elkins Act, if so construed as to permit the joinder of defendants in the manner attempted in this indictment, is unconstitutional and void, in that it thereby undertakes to impute to corporations and punish them, as well as their agents, for acts in which the corporation does not and cannot participate, or take any part, except by a legal fiction.

The court denied the motion and the defendant corporation excepted.

56 In denying the motion the court said:

"I do not think I need to hear you, Mr. Stimson. The

Elkins Act provides clearly in my opinion that a corporation may be indicted, and that officers of it may be indicted, separately, certainly. I do not see on general principles why they cannot be indicted together. The language of the Act itself is very specific on the point and its meaning I think has greater weight from the circumstances under which it was passed. The original Interstate Commerce Act provided, as I recall, for punishing the officers of a corporation by a fine or imprisonment, and it was generally understood that the consideration which led to the passing of the Elkins Act was the fact that it was found difficult to convict officers of a corporation, particularly in view of the fact that they were liable to punishment by imprisonment, because jurors thought, and thought properly, that the corporation was the party that ought to be punished and the officers ought not to be punished for doing what presumably they did in accordance with the wishes of the corporation, but which it was very often difficult to show that anybody in the corporation authorized, or that anyone had anything to do with it except the officers who were directly concerned with making the agreement to pay rebates and paying rebates. It was to meet that difficulty that the Elkins Act was passed. The direct object of it was to make the corporation responsible as well as the officers, and substitute a fine on the corporation for the punishment of the person convicted by imprisonment.

Now that being the intention of Congress and its intention being clearly shown by the Act, it certainly would be improper in my opinion for the court trying a case in the first instance particularly to hold that the Act was illegal or unconstitutional unless the court's position was very clear on the subject; and instead of that being the case in my mind I do not see any difficulty in the constitutionality or legality of the legislation in question. The cases which have been cited of an individual master and an individual servant are essentially different. The argument is very weighty in those cases, but where the individual servant is guilty of the criminal act in the course of his master's business and there is no evidence whatever that the master consented to it or had anything to do with it, the general principle of law would be that a statute making the master criminally punishable in such a case as that was invalid. But a corporation is an essentially distinct entity. It only acts by its officers and there is no such separation between the corporation and its officers, although they discharge duties which make them for certain purposes under the civil law servants and the relation between them is that of master and servant under the civil law, yet the relation is essentially different from that which would be the relation between an individual master and an individual servant, and I think it is entirely competent for Congress to provide that a corporation shall be criminally liable for the acts of its agents which constitute crimes, if it sees fit to do so. That is to say, it makes them punishable by a fine for the acts of its agents. Every one knows that practically in this class of cases where rebates are given by freight avents or transfer agents it is either actually authorized by the corporation, or the agent sup-

57

posed that it was authorized, or that it would be approved, and the moneys paid by the corporation are not paid actually by the agent in actual ordinary practice. To say under these circumstances that it is not within the power of Congress to provide that a corporation can be fined because of the action of its agents even if the Government is not able to show that the corporation took any part in authorizing the proceedings, it seems to me would be to apply the ordinary principles of master and servant as they exist between individuals to a case which ought not to be strictly governed by them. Moreover it may appear in the evidence in this case that the corporation did as a corporation take an actual part in the transaction of taking or giving the rebate as well as the two officers who made the contract. I do not know what evidence may be given in this case but I would not be prepared to say in advance of the trial that that might not be the fact. It is alleged in the indictment that the railroad company and its agents paid these rebates and I should think it might very well occur in a case of this kind and in this case that while the agreement to pay the rebates was made by the freight agent, and perhaps the checks drawn and personally handed over by the freight agent, that in fact the money came from the treasury of the company with the knowledge of the officers of the company. If that took place it would amount to a ratification by the company of the acts of its agents even if there were no proof of original authority to do so, and it would amount in my opinion to proof that both the corporation and the freight agent participated in the offense charged in the indictment.

From every point of view it does not seem to me that the considerations suggested by counsel are sufficient for me to grant the motion to quash and dismiss the indictment for misjoinder. I deny the motion."

58 A jury having been duly empannelled and sworn the defendant corporation moved that the jury be directed to render a verdict of acquittal on the ground of misjoinder and for each of the other reasons set forth in the motion to quash or dismiss.

The Court denied the motion and the defendant corporation excepted.

The defendant corporation then moved that the court require the United States Attorney to elect whether the trial should proceed upon the theory that the indictment charged the giving of unlawful rebates in violation of the Act of February 19, 1903, or upon the theory that it charged a wilful failure strictly to observe published tariff rates in violation of that Act.

The Court denied the motion and the defendant corporation excepted.

Mr. Stimson opened the case to the jury.

Both of the defendants thereupon, solely for the purposes of the trial, however, admitted by a written stipulation, as shown beyond a reasonable doubt (reserving the question as to how far the facts so admitted might be relevant as against one defendant or the other) as follows:

At all the times mentioned in the indictment The New York

Central and Hudson River Railroad Company was, and still is, a railroad corporation duly organized under and existing by virtue of the laws of the State of New York, and was engaged in the operation of lines of railway extending from the City of New York to the cities of Buffalo and Niagara Falls, all of which cities are in the State of New York, and was at all of the said times engaged in the transportation of passengers, freight and property for hire over the said lines of railway between the places last before mentioned.

At all of said times The Michigan Central Railroad Company was, and still is, a corporation duly organized and existing under the laws of the State of Michigan, and was engaged in the operation of a line of railway and connecting with that of the aforesaid The New York Central & Hudson River Railroad Company at
59 Suspension Bridge in the said City of Niagara Falls, and extending from Suspension Bridge in the State of New York through the Dominion of Canada to the City of Detroit, in the State of Michigan, and at all the said times the said The Michigan Central Railroad Company was engaged in the transportation of passengers, freight and property for hire over its said lines between the said last mentioned places.

At all the said times The New Central & Hudson River Railroad Company and The Michigan Central Railroad Company had jointly established and were operating a continuous fast freight line or route known as the "North Shore Despatch" from Palmer's Docks, in the Borough of Brooklyn, in the City of New York, State of New York, and from Palmer's Warren Street Terminals in the City of Jersey City, State of New Jersey, over the railroads aforesaid, by way of the Southern District of New York, to the City of Detroit, in the State of Michigan, and were engaged in transporting freight on through way bills over said continuous line or route.

At all the said times the said The New York Central & Hudson River Railroad Company had established and had *had* filed with the Interstate Commerce Commission, and had published a joint tariff of rates, fares and charges for the transportation of passengers and property over the aforesaid continuous line or route from the said Palmer's Docks and the said Palmer's Warren Street Terminals to the said City of Detroit, at. he said The Michigan Central Railroad Company had filed with the Interstate Commerce Commission a written concurrence in the said joint tariff; and the said joint tariff so as aforesaid filed, published and concurred in by the said railroad companies plainly stated the places upon the said railroads between which property and passengers would be carried, and contained the classification of freight at said times in force.

At all times mentioned in the first, second, third, fourth, fifth and seventh counts of the indictment herein the rates set forth in said joint tariff so established, filed, published and concurred in, as aforesaid, to be charged for the transportation from the said Palmer's Docks and the said Palmer's Warren Street Terminals to the said City of Detroit, over the said continuous line or route upon carload shipments of sugar in barrels or bags was twenty-three cents for each one hundred pounds thereof, and at all the times mentioned

in the sixth count of the indictment herein the rates set forth in the said joint tariff to be charged for the transportation from the said Palmer's Docks and the said Palmer's Warren Street Terminals to the said City of Detroit over the said continuous line or route upon such property was twenty-one cents for each one hundred pounds thereof.

At all the times mentioned in the indictment The American Sugar Refining Company was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and The American Sugar Refining Company of New York was a corporation organized and existing under and by virtue of the laws of the State of New York.

60 At all the times mentioned in the indictment Nathan Guilford was Traffic Manager of The New York Central & Hudson River Railroad Company, and Fred L. Pomeroy was Assistant Traffic Manager, and as such they had general charge of the freight traffic over the said line of railroads of the said Company.

On the twenty-sixth day of April, in the year one thousand nine hundred and four, the said Fred L. Pomeroy sent to one Lowell M. Palmer, a letter of which the following is a copy:

"New York Central & Hudson River R. R. Co.

West Shore Railroad.

Grand Central Station.

F. L. Pomeroy, Ass't Traffic Manager.

NEW YORK, *April 26th*, 1904.

Private and Confidential.

Lowell M. Palmer, Esq., 184 Front Street, New York City.

DEAR SIR: Referring to your letter of April 11th, and my conversation over the 'phone yesterday, the 25th instant, with your Mr. Riley, which I understand was repeated to you and verified, all in regard to sugar shipments for W. H. Edgar & Son.

This is to advise that, taking effect immediately, we will undertake to handle Edgar's shipments for Detroit and such shipments are to be reforwarded from there to points on the Michigan Central R. R. at a rate of 18 (eighteen) cents per 100 lbs., New York to Detroit all-rail, shipments to be billed at tariff rates and refund made by voucher.

This arrangement is made in consequence of the through rate via canal and lake and rail and lake put in by the Detroit & Cleveland Navigation Co. in connection with the Michigan Central, Grand Trunk, Pere Marquette, and G. R. & I. Roads, effective April 22nd, 1903, and which rates I understand have been renewed for the season of 1904.

This arrangement will cover shipments out of New York from both the American and Howell Refineries, and will also apply from

Yonkers if shipments are made from that point. The question as to Howell's being advised of this private arrangement with Edgar rests in abeyance until the writer can have a personal interview with you regarding same.

As advised over the 'phone, I think it would be well to confine this arrangement to Edgar's traffic, as outlined above, leaving his traffic that is going to points on the Grand Trunk, Pere Marquette and G. R. & I. Roads to move via such lines as he may elect, with the understanding that where he can favor either the West Shore or this company, as far as the haulage to Buffalo is concerned, he will undertake to do so.

Please advise if satisfactory and understood.

Yours truly, F. L. POMEROY."

U. S. Mail.

Thereafter the various shipments of sugars mentioned in the respective counts of the indictment were made, the said sugars being shipped in carload lots in bags or barrels and the said sugars were transported by a continuous through haul and movement on through way bills, said way bills being in the forms annexed, over the said continuous line or route known as the "North Shore
61 Despatch" from the said Palmer's Docks and the said Palmer's Warren Street Terminals to the said city of Detroit, at the times and in the quantities and in the manner alleged in the indictment, and the full tariff rates thereon and no more were paid.

At the times and places mentioned in the indictment claims for the difference between the full tariff rate so paid on the said sugars and the rate named in the last mentioned letter, which difference amounted to the sums specified in the indictment, were filed with the said The New York Central & Hudson River Railroad Company by Lowell M. Palmer, claiming to act on behalf of the said W. H. Edgar & Son, the same persons named in the said Letter.

(Forms of Way-Bills Annexed to the Foregoing Stipulation.)

(a.)

Initial Road, North Shore Despatch.

Way-Bill.

From Weehawken, State of New Jersey, to Detroit, State of Mich.

Date, SEPT. 1, 1904.

Series C. M. No. 1903.

Car No. 12675. Initials NYC.

Route: Via Junction Sup. Bridge with M. C. Ry.

Marks, —.

Consignor.	Consignee & destination.	No. of pkgs.	Art. and class.	Wt.	Freight.	Prepaid.
Pal Dk.....	W. H. Edgar & Son Detroit, Mich.	100 Bbls.	Sugar.	9375 37356-23	85.92	85.92
Am S R Co. 882 #1272			Emp a 5			
Dunnage 35756 1600 37356						
					58.19	
					Pd.	85.92

Carded Home
M. C. R. R. Co.
Sep. 2 1904
Suspension Bridge

Railroads.	Earnings. Per cents.	Divisions.
Ltg.	4 1/5	15.69
W. S.	60.51	42.50
M. C.	39.49	27.73

(*b.*)

Initial Road, West Shore Despatch.

Way-Bill.

From Weehawken, State of N. J., to Detroit, State of Mich.

Date, 9/7/1904.

Series C. M. No. 1943.

Car No. 835. Initials, N. & W.

Route: Via Junction S. B. with M. C. Ry.

Weighed at Warren St., J. City.

Marks, —.

Consignor.	Consignee & destination.	No. of pkgs.	Art. and class.	Rate and authority.	Freight.	Prepaid.
62						
Warren St. J. City.	W. H. Edgar & Son	100 Bags	Sugar	A 375		
Amer S R Co.	Do.					
2077	D 640.	10000/100	10100	23	23.23	23.23
2838 (Part lot Balto follow)						23.23

Carded Home.
M. C. R. R. Co.
Sep. 8 1904
Suspension Bridge.

Railroads.	Earnings. Per cents.	Divisions.
Light	4 1/5	4.06
W. S.	60.51	11.60
M. C.	39.49	7.57

It was further admitted by the defendants and each of them, (for the purposes of the trial only) that at a regular meeting of the Executive Committee of the Board of Directors of The New York Central and Hudson River Railroad Company, held September 28th, 1887, the defendant, Nathan Guilford, was duly appointed General Traffic Manager of The New York Central and Hudson River Railroad Company, and that he continued in such position until May 11th, 1898, when he was duly appointed at a regular meeting of the Board of Directors of said Company to be General Freight Traffic Manager, and that as such General Freight Traffic Manager he was charged with the general supervision of all freight traffic matters of said Company, that he held such position and performed said duties from thenceforth until February 1st, 1905; that subject to the approval of the Executive Committee of the Board of Directors, the President of said Company had at all the times mentioned in the indictment general power to appoint such officers and assistants as he might require, who should perform such duties

as from time to time might be assigned to them by him, and it is further admitted that at no time has the Board of Directors, or the Executive Committee, or the President of said Company, by any resolution or executive order, created any such position as Assistant General Traffic Manager, or Assistant General Freight Traffic Manager, or Assistant Freight Traffic Manager; that on February 1st, 1901, Mr. Fred L. Pomeroy, one of the defendants, was by said Nathan Guilford, Traffic Manager, appointed Assistant Traffic Manager of said Company, and that said appointment was made with the sanction of the President; and from February 1st, 1901, to June 30th, 1904, said Fred L. Pomeroy was recognized by the said Company and its officers as such Assistant Traffic Manager, but no resolution of the Executive Committee or Board of Directors has ever been adopted creating such position or expressly ratifying such appointment; that June 30th, 1904, said defendant, Fred L. Pomeroy, was by order of said defendant, Nathan Guilford, appointed Freight Traffic Manager of said Company, and that such appointment was recognized by said Company and its officers, and that he has continued in such position from said date to the present time; that no resolution of the Board of Directors or the Executive Committee, or any other committee of the Company has been adopted creating such position or defining the powers and duties of such
63 position; that at the time mentioned in the indictment, the defendant, Nathan Guilford, as General Freight Traffic Manager, and the defendant, Fred L. Pomeroy, as Assistant Freight Traffic Manager, or Freight Traffic Manager, were authorized to establish rates at which freight should be carried over the line of The New York Central & Hudson River Railroad Company, and to unite with other companies in the establishment, filing and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment; that the exhibits hereinafter set forth marked (*c*), (*d*), (*e*), (*f*) and (*g*) respectively, are copies of resolutions and notices of appointment herein referred to, and that there are no other minutes of the stockholders, directors, or Executive Committee or executive orders, since September 28th, 1887, creating any of the before-mentioned positions or defining the functions and duties of such offerers.

(*c*)

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of The New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Company at a meeting held at Grand Central Depot, in the City of New York, on September 28th, 1887:

Resolved: That Mr. Nathan Guilford be appointed General Traffic Manager of this company to take effect October 1, 1887.

D. W. PARDEE, *Secretary.*

(*d*)

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of The New York Central and Hudson River Railroad Company, hereby certify the following to be a corect transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Company at a meeting held at Grand Central Depot, in the City of New York, on May 11th, 1898:

Mr. Nathan Guilford, General Freight Traffic Manager, will have general supervision of all freight traffic, and Mr. George H. Daniels, General Passenger Agent, of all passenger traffic, reporting direct to the President.

D. W. PARDEE, *Secretary.*

(*e*)

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of the New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committe of the Board of Directors of said Company at a meeting held at Grand Central Depot, in the City of New
64 York, on February 1st, 1905.

The President explained the desirability of placing traffic matters in charge of a Vice-President; and, on his motion, Mr. Nathan Guilford was appointed Vice-President, in charge of such matters.

D. W. PARDEE, *Secretary.*

(*f*)

The New York Central & Hudson River Railroad Co.

NEW YORK, *February 1st,* 1901.

Mr. F. L. Pomeroy has been appointed Assistant Traffic Manager of this Company, effective this date.

His office will be at Grand Central Station, New York City.

NATHAN GUILFORD,
Traffic Manager.

(*g*)

New York Central & Hudson River Railroad,

Leased and Proprietary Lines.

General Notice.

NEW YORK, *June 30th*, 1904.

The following appointments and changes in organization of the Freight Department will take effect July 1st 1904:

Fred L. Pomeroy, Freight Traffic Manager.

Francis LaBau, Assistant Freight Traffic Manager.

Herbert D. Carter, General Freight Agent, West Shore R. R.

William S. Killman, 1st Ass't G. F. A., N. Y. C. & W. S. R. R.'s.

Ira H. Hubbell, 2nd Ass't G. F. A., N. Y. C. & W. S. R. R.'s.

H. W. Henry, Assistant General Coal Agent.

William A. Newman, Traveling Freight Agent, Hudson, Harlem and Putnam Divisions. Offices at Grand Central Station, New York City.

The office of Chief of Tariff Bureau is abolished and that Bureau will be in charge of the 1st Assistant General Freight Agent.

The office of Division Freight Agent of the Hudson, Harlem and Putnam Divisions is also abolished.

NATHAN GUILFORD,
Traffic Manager.

Both of the defendants further admitted that on the 21st day of September, 1906, Mr. Harris, their attorney, had been served by the United States Attorney with a notice in writing that unless certain books, papers and documents therein specified were produced upon the trial, secondary evidence would be given of their contents.

The Government to maintain the issues upon its part called as a witness George T. Roberts who testified as follows:

65 I am assistant auditor of the Interstate Commerce Commission. I have produced all tariffs applying on fifth class merchandise filed by the New York Central and Hudson River Railroad Company and by the West Shore Road with the Interstate Commerce Cimmission which were in effect between April 26, 1904, and November 1, 1904. I have also produced the official classification of freight rates filed with the Commission by the New York Central and Hudson River Railroad Company and by the West Shore Road, which interprets the tariffs; also the concurrences by the Michigan Central Railroad Company in the foregoing tariffs. The all-rail rate on fifth class merchandise during the whole of the year 1904 via the New York Central and Hudson River Railroad Company and its connections from the City of New York to Detroit was twenty-three cents per one hundred pounds. There were, however, tariffs filed by the New York Central and Hudson River Railroad Company making a special commodity rate of twenty-one cents per

one hundred pounds on sugar from New York to Detroit applicable during the month of June, 1904. That rate became effective May 31, 1904, and remained in effect until withdrawn on June 30, 1904. Sugar in carload lots and shipped in barrels or bags was included in the fifth class of the official classification. The Eastern terminals to which this tariff rate applied included Palmer's Docks in Brooklyn and Palmer's Warren Street Docks in Jersey City. The same rate existed by the tariffs filed by the West Shore Railroad which was concurred in by the Michigan Central Railroad Company.

The Government here admitted that during and throughout the year 1904, and prior thereto, there were in operation between Palmer's Docks in Brooklyn and Palmer's Warren Street
66 Docks in Jersey City, and the City of Detroit, Michigan, lines operated by common carriers engaged in carrying freight of the same kind as that mentioned in the indictment from the said Eastern terminals to Detroit wholly by water.

The Government further to maintain the issues upon its part called as a witness Frederick E. Hurst, who testified as follows:

I am employed in the sales department of the American Sugar Refining Company and was in their employ during the year 1904, at which time Mr. Osborne, who is now dead, was the head of that department. The office of the company was at 117 Wall Street. It had a refinery which it was operating in Jersey City, New Jersey, and the Wall Street office was also connected with the American Sugar Refining Company of New York, which was operating a refinery in Brooklyn. During the year 1904 all the orders for both refineries came through the Wall Street office, which was the general sales office, and the orders were accepted at the New York price for sugar. The office operated from both refineries. We delivered the order to the refinery which had the larger stock, and the shipping conditions governed that too. In 1904 we shipped sugar to a concern in Detroit. by the name of W. H. Edgar & Son. My recollection is that all the shipments were prepaid. We received instructions in regard to the routing of the sugar sold to Edgar from the office of Lowell M. Palmer, through his representatives. Mr. Palmer himself did not look after the detail of advising our office. I do not recall what route was ordered as to sugars during the summer of 1904 beginning with April 26th. I handled so much stuff that I cannot remember any changes having been made during that summer. The orders are made up in our office and put in shape for the refinery
67 on the prepaid basis, and the prices &c. That order I copy and send to the refinery. It shows everything in connection with the order, including the route, and is afterwards filed in our office. These freight bills go through the freight department of which Mr. Treloar has charge.

On cross examination the witness testified that it had always been customary to ship sugar every season by the canal and lake route, that is, by all water from the sugar refining company's points in New York and Jersey City to Detroit.

The Government further to maintain the issues on its part called as a witness LOWELL M. PALMER, who testified as follows:

In 1904 I was a director of the American Sugar Refining Company of New Jersey. I may have been a director of the New York Company also, but am not sure. The two companies were not sharply distinguished in my mind. Both of them were operating in connection with my office at 184 Front Street. I was the head of that office. I kept a number of books there, and had certain clerks under me. That office covered the cooperage business, lighterage business, coal business and the traffic business. Mr. Riley acted as traffic manager of the American Sugar Company, and that work was done in my office. Mr. Riley generally used my name in so acting. He was acting under my direction and was paid by me. Besides Mr. Riley I had in the traffic department Mr. Whitaker, Mr. Muench and Mr. Leeming.

In ninety-nine per cent. of the cases my office named the tariff rate to the American Sugar Refining Company on its sugar, and the company shipped it and paid that rate. In certain other instances there were lower rates, limited to a very small amount
68 of sugar as compared with the large shipments, and it named that lower rate. The traffic business carried on in my office consisted in naming the rates of the railroads, and, in general, selecting, the route. After my office had named the rate and selected the route, it would communicate the rate and the route to Mr. Osborne who was at that time the head of the sales department. In the course of this business I collected moneys and deposited them in a bank account. I think that account was with the Market & Fulton Bank. My office ceased to conduct this traffic business late in December 1904. I then sent this series of letter books to the office of the American Sugar Refining Company at 117 Wall Street. I was acquainted with Nathan Guilford in 1904. On or about April 11, 1904, I signed the original letter, of which a copy is now shown me. I have no recollection of what was done with it. By the system then in my office letters signed by me were copied and mailed.

The United States Attorney then offered in evidence the original letter of April 26, 1904, from the defendant Fred L. Pomeroy to Lowell M. Palmer, a copy of which forms a part of the stipulation first herein set forth, and the sending of which by the defendant Pomeroy to the witness is therein admitted. Both defendants admitted the authenticity of the letter and again conceded that it was sent by the defendant Pomeroy to the witness, but the defendant corporation objected that it was inadmissible and irrelevant to bind it; that the declarations of the defendant Pomeroy were irrelevant and inadmissible to bind it; that no authority was shown in the defendant Pomeroy to write the letter or make the statements therein; that it did not purport to be a letter sent by the de-
69 fendant Pomeroy as Assistant Traffic Manager, but to be sent by him individually, although written on paper bearing the name of the corporation.

The objection was overruled and the letter was admitted in evidence as against both defendants and marked Exhibit 5. The defendant corporation excepted.

The United States Attorney then offered in evidence the letter press copy referred to by the witness, of his ltter of April 11, 1904, to the defendant Nathan Guilford, the introduction of which as against it was objected to by the defendant corporation, generally, on the grounds (1) that the witness' declarations were irrelevant and inadmissible to bind it, and (2) that there was no evidence that the letter had been received by the defendant Guilford, and specifically, on the ground that the statements contained in the sentence beginning with the words: "Edgar is very" and ending with the words "* * * for him in the way of rates this season," and the two following sentences were irrelevant and incompetent to bind the corporation.

The Court admitted the letter of April 11, 1904, stating that it was admitted, not as proof of any of the facts stated in it, but for the purpose of showing the knowledge of the defendant Pomeroy—what he had in his mind when he wrote his letter of April 26, 1904; and the same was marked Exhibit 6. The defendant corporation excepted.

Before reading Exhibit 6 to the jury the examination of the witness Palmer was suspended and the Government further to maintain the issues on its part called as a witness ARTHUR
70 B. HOLMES, who testified:

I am secretary to Nathan Guilford, traffic manager of the New York Central Railroad Company and at present Vice-President. Within the last six months I have seen the original of Exhibit 6. I found it on the defendant Pomeroy's files in the New York Central Railroad building in New York City.

The United States Attorney then again offered Exhibit 6 in evidence. Counsel for the defendant corporation renewed its objection and moved to strike out the letter upon all the grounds stated at the time of the previous offer, and upon the further ground that it appeared affirmatively by the testimony of the witness Holmes so far as it could appear that way, that the original letter never reached Mr. Guilford, and that, so far as the defendant corporation was concerned, the letter did not appear to have been an official communication received by anybody having authority to represent it.

The court overruled the objections and the defendant corporation excepted. The court also denied the motion to strike out the letter and the defendant corporation excepted.

Counsel for the defendant Pomeroy here produced and delivered to the United States Attorney certain papers and documents specified in the before mentioned notice, and stated that the same were the only papers and documents so specified then in the defendant Pomeroy's possession or control; and that if any books, papers or documents so specified had not been produced their non-production

was due to his physical inability to produce them. Counsel for the defendant Pomeroy admitted that the originals of such of
71 the papers so produced as purported to be carbon copies of letters, were signed and sent by the defendant Pomeroy. The United States Attorney took possession of the papers and documents so produced with the consent of the defendants.

The witness PALMER being re-called testified further as follows: I presume the rubber stamp endorsements on the back of the five drafts now shown me, reading, "Pay to the order of the Market & Fulton National Bank, Lowell M. Palmer," is my stamp and that these drafts were so stamped with my authority. We used a similar stamp in my office in connection with the account in that Bank about which I have testified.

The five drafts shown the witness were marked for identification Exhibits 7, 8, 9, 10 and 11, respectively.

The WITNESS (continuing): I think I had a personal interest in some portion of that account in the Market & Fulton Bank and that there was carried in connection with it a small amount of money that went into the lighterage account in which I did have an interest. But I had not interest in the traffic business. The signature on the letter now shown me dated April 29, 1904, addressed to F. L. Pomeroy, Asst. Traffic Manager, &c., is mine.

(Letter marked for identification, Exhibit 12).

Being cross examined by Mr. Lindsay, on behalf of the defendant Pomeroy, the witness testified:

During the year 1904 there was an all water route from New York City to the City of Detroit, Michigan, which was used for the transportation of sugar. There was shipped to W. H. Edgar & Son by the all water route during the season of 1904 upwards of ten
72 thousand barrels of sugar. A barrel of sugar weighs about 370 pounds—350 pounds net and 20 pounds for the barrel. The all water route was by canal boat from the refineries to Buffalo, where the sugar was transferred from the canal boats into the boats of the Detroit & Cleveland Navigation Company, lying alongside of each other in the water. The Detroit & Cleveland Navigation Company is a line of steamboats running from Buffalo to Cleveland or to Detroit. The all water route had no well-understood name in the trade except that of the Canal and Lake Route. That route had been in effect to a certain extent for a year previous.

By Mr. STIMSON:

I do not think the same rate as that stated in my letter had been in effect for a year previous, but there had been a rate, not so low, in a previous year, and during the season of 1904 the Cleveland & Detroit Navigation Company put in an unusually low rate of freight.

Being cross-examined by Mr. Fox on behalf of the defendant corporation the witness testified:

This unusually low rate was in force at the time I wrote Exhibit 6.

Mr. Newman was then the president of the New York Central. I never sent Mr. Newman any written communication on the subject. I never had any conversation with him at all, nor with any other officers of the New York Central Railroad Company except Mr. Guilford or Mr. Pomeroy. No other officer of the company had any knowledge of the matter from me. Exhibit 6 is the only letter I ever addressed to Mr. Guilford on the subject to which it refers. The rate by the all water route was a 13 cent rate.

By Mr. STIMSON:

This was not the only occasion on which I communicated
73 with Mr. Guilford on the subject of rates, but it was the only occasion on which I communicated with him on the subject of this particular rate—this particular transaction. I consulted with him quite frequently on the subject of rates over the New York Central and its auxiliary lines, and I think his decisions in regard to the rates were uniformly carried out. The canal rate had generally been considerably lower than the all rail rate. I am an old traffic man. I think I remember a time when the rate on merchandise by canal was not a great deal lower than the all rail route. It was pretty rarely so, but there were occasions. It is generally five cents a hundred lower.

Further to maintain the issues on its part the Government called as a witness WILLIAM F. WILSON who testified:

I am general manager of the New York Central and West Shore Fast Freight Lines, whose office is in Buffalo. These lines include the North Shore Despatch, which is a route or continuous through line over the New York Central and Michigan Central lines. During the year 1904 my office made up claims against the lines concerned in the Fast Freight lines, made vouchers for them and paid them. The claims came to my office for payment. W. F. Boardman was the cashier of my office at that time. He furnished the money for the payment of these claims. He had an account. I think it was with the Bank of Buffalo. During 1904 W. Presinger was chief clerk and John S. Embleton was voucher clerk in my office. Claims coming for payment against the Fast Freight Lines passed through the hands of Mr. Presinger. He and his assistant opened the mail, and that is where the claims came. Mr. Presinger did not handle any
claims except to the extent of passing them around to the
74 proper parties in the office for adjustment. There was a class of claims handled by Mr. Embleton. I think very probably Presinger handled another class of claims. I was acquainted with the system my employees adopted. The account of which Boardman, the cashier, had charge, and out of which the various claims were paid was made up of moneys contributed by the different railroads constituting the different fast freight lines. I do not know that I can recall all the railroad companies that contributed moneys for the payment of claims against the North Shore Despatch, but the New York Central, the Michigan Central and, I think, the Boston and Maine, were among them. Whenever a claim was paid against any one of the Fast Freight Lines the payment was cha-ged by prorating

it over the lines which constituted the Fast Freight Line in question. I have been subpœnaed to produce certain claims presented on July 7, 1904, by Lowell M. Palmer against the North Shore Despatch, bearing Palmer's serial numbers 36476 and 36476A. The reason I have not produced them is that I cannot do so as I have not got them in my possession. I do not know whether they have ever been in the possession of my office. We have no records that show it. We keep the claims until there is an audit, and then they are destroyed. There is an audit of the only kind of claims that I have any charge of every three months. Claims for loss and damage, and switching and terminal relations with other roads that came to Presinger are all in the custody of the Central Clearing House which is in the same building in Buffalo as my office, and not in my custody. They do not come into my custody after they are vouchered. They pass through my hands and are vouchered. There are two classes of claims, one of which remains in my office until an audit when they are destroyed, and the other goes to the Central Clearing House. Mr.
75 Embleton handled the former class of claims. I cannot say for exactly how long he handled them, but I suppose three or four years. He handled them in 1904 and until March, 1906, when he went away sick. To the best of my recollection he went away on the 17th of March and I have not seen him since. He went to San Antonio, Texas. His leave of absence extended until his health recovered and he came back. He has not yet returned. I testified before the Grand Jury in March. I do not know whether the before mentioned claims of Lowell M. Palmer, Nos. 36476 and 36476A were claims of the character which would pass through Embleton's hands. I have made a search for them in my office. I cannot find them. I never destroyed any either. My subpœna also calls for letters, telegrams, communications, including any letters of enclosure of these claims, and communications of every nature whatsoever from Nathan Guilford, R. L. Calkins, Lowell M. Palmer or Thomas P. Riley in reference to such claims. I have made a search for such letters of enclosures, but have not found any. The claims which were handled by Mr. Embleton came regularly either by mail or by express. were opened in the office and passed over to him. They might have come from some railroad other than the New York Central and Hudson River Railroad. I cannot say that they came from one special department. In the case of the New York Central and Hudson River Railroad Company they came from Mr. Pomeroy's office, and from Mr. Calkins, general freight agent, and possibly from the office of Mr. La Bau, the assistant traffic manager. I think during the year 1904 Mr. Embleton kept a record of these claims in a book. I have been subpœnaed to produce that book. I have not produced it. I do not know where it is. I have made a
76 search for it. I cannot answer whether that book formed a large part of my office records until last March. I have seen it in Mr. Embleton's custody, on his desk. I have not seen it since his departure. I have searched since his departure. I may not have seen it for a year, or probably six months previous to his departure. I was also subpœnaed to produce Lowell M. Palmer's claims 36,690,

36,876, 37,100, 37,373 and 37,776 against the North Shore Despatch. I have not produced those claims. I cannot find any record of the numbers or anything connected with them. I have made a search for each one of those claims and have not found them.

The witness being shown a carbon copy of a letter addressed to him, the original of which was admitted by the defendant Pomeroy's counsel to have been signed by Mr. Pomeroy, and being also shown a paper purporting to be a letter addressed to the defendant Pomeroy and signed in the witness' name per "E," dated October 26, 1904 (both of the papers shown the witness having been produced by the defendant Pomeroy pursuant to the before mentioned notice), testified that he recognized the signature to the letter of October 26, 1904, and that it was Mr. Embleton's, and that having read the papers shown him, he could state from his knowledge of the system of his office that claims 37100 and 36876 were claims of the character handled by Mr. Embleton. The witness further testified that the signatures to certain letters produced by counsel for the defendant Pomeroy addressed to Mr. Pomeroy and dated August 23, 1894, September 12, 1904, October 26, 1904, November 19, 1904, and December 19, 1904, respectively, were the signatures of Mr. Embleton, and these letters were thereupon marked for identification Exhibits 13, 14, 15, 16 and 17, respectively.

77 Being cross-examined by Mr. Fox on behalf of the defendant corporation the witness testified:

The purpose of auditing the claims that were destroyed was to enable the company that was entitled to a certain portion of the money to see whether the money had been handled properly and not misappropriated. When that was done there was no further use for those papers. We got a large number of claims. We had not much room to keep the records and they were destroyed. They were not required after an audit anyhow.

By Mr. STIMSON:

The class of claims which went to the Central Clearing House were much larger in volume than those which came through Mr. Embleton's hands. The latter were comparatively few as compared with the claims that went to the Central Clearing House.

Further to maintain the issues on its part the Government called as a witness WILLIAM F. BOARDMAN, who testified:

I am cashier of the New York Central and West Shore Fast Freight Lines, about which the witness Wilson testified. I am also cashier of the Central Railway Clearing House the office of which is in the same building in Buffalo. I had during the year 1904, as cashier, an account with the Bank of Buffalo. As cashier I received all moneys and I paid all claims either out of this account in the Bank of Buffalo or through the Lincoln Bank in the City of New York. The claims which I paid by check or draft in Buffalo were usually paid out of the bank account in the Bank of Buffalo. The

moneys which went into this account were received from the various roads constituting the Fast Freight Lines. I received moneys from
78 the New York Central and Hudson River Railroad Company in the form of checks and placed them in that account. During the whole of the year 1904 they were always produced from the treasurer of the New York Central and Hudson River Railroad. When I paid a claim on account of the North Shore Despatch vouchers would be entered in the cash book and checks drawn for the amount of the vouchers in favor of the claimant. The matter of charging the payment was in the hands of the Claim Department. I would refer to it in my cash book merely by the number of the voucher. The General Bookkeeping Department posted it. No paper showing how the posting was to be made passed through my hands. Claims for loss and damage or for switching charges from other railroads came to me direct from the General Bookkeeper. I do not know whether it came through Mr. Presinger's hands. I would pay such a claim by check drawn to the order of the claimant usually upon this account in New York. There was another class of claims which I did not pay by check directly to the order of the claimants. These claims came to my hands through John S. Embleton. I paid such claims as that by New York drafts which I got at the Bank of Buffalo. There would be a request on my desk from Mr. Embleton for certain drafts and I would buy them. The drafts would be turned over to Mr. Embleton. In order to get the drafts I would draw a check on my account, payable to the Bank of Buffalo. I would then go to the bank and buy a cashier's draft which would be given to Mr. Embleton. I recognize the paper attached to Exhibit 7 for identification now shown me. It is a request on the bank of Buffalo to issue certain drafts. This request came from Mr. Embleton's office. I do not know whether he made it out. That paper was a request for me to buy certain drafts from the
79 Bank of Buffalo in favor of the parties named on the ticket, and attached behind the draft are certain other similar tickets, all dated the same day, August 23, 1904. Exhibits 8, 9, 10 and 11 for identification now shown me, are drafts purchased upon tickets given me by John S. Embleton and the papers attached are requests for the purchase of drafts received by me the same way. The different drafts mentioned in the tickets annexed to each of the drafts were in each instance purchased by a single check upon my bank account, and the different drafts were payable to the different parties mentioned on the tickets, including the one payable to L. M. Palmer.

Counsel for the defendants here admitted that Exhibits 7, 8, 9, 10 and 11 for identification were genuine drafts signed by the appropriate officer of the Bank of Buffalo, and that they were paid through the New York Clearing House on the dates stated on the stamp of the Market and Fulton Bank on the back of the drafts The five drafts and the draft tickets annexed to each were then offered in evidence and admitted without objection and marked Exhibits 7, 8, 9, 10 and 11, respectively.

Further to maintain the issues on its part the Government called as a witness JAMES S. TRELOAR, who testified:

I am a clerk for the American Sugar Refining Company. I keep and have charge of the freight books of the American Sugar Refining Company and the American Sugar Refining Company of New York. During the year 1904 the freight on all sugar shipments to W. H. Edgar & Son was in every case prepaid by the sugar company to the New York Central and Hudson River Railroad.

80 Further to maintain the issues on its part the government called as a witness HARRY T. LEEMING, who testified:

During the year 1904 I was in the office of Lowell M. Palmer in charge of the freight traffic business of the American Sugar Refining Company and the American Sugar Refining Company of New York, under Thomas P. Riley. My duties were to quote rates, handle claims and route shipments. I remember handling claims in regard to sugar shipments to W. H. Edgar & Son during the year 1904. They were made up by me each month from data of the forwarding of the shipments. Each day our office received tissue copies of the way bills covering the sugar shipments, and from those tissue copies I made extracts of the number of pounds in each shipment and the rate at which it was prepaid, and the point to which it was consigned. At the end of each month I made a tabulation of the total number of pounds, and divided that by one hundred and multiplied it by five cents. I kept a record of these claims and have the books containing such records.

Claim 36209 covered shipments during the months of April and May. The total tonnage was 603,283 pounds and the amount of refund claimed is $301.64, which was arrived at by dividing the number of pounds by one hundred and then multiplying by five cents.

Claim 36,251 covers shipments during the month of May 1904 to W. H. Edgar & Son, Detroit. The total tonnage is 3,018,124 pounds. That divided by one hundred and then multiplied by 5 cents is $1,509.06.

Claim 36,476 is a claim against the Merchants' Despatch covering shipments to W. H. Edgar & Son, Detroit, during the months of April and May, 1904, amounting to 571,422 pounds. That
81 claim was made up on the basis of five cents per 100 pounds and amounts to $285.71. That claim was paid September 20, 1904.

Counsel for the defendants here admitted that this claim (No. 36,476, amounting to $285.71) was paid by a cashier's draft on the Metropolitan Trust Company of the City of New York, which had been purchased by the cheque of the Merchants' Despatch Transportation Company.

The WITNESS (continuing): Claim 36476A was a claim of a similar nature against the North Shore Despatch. The total tonnage was 3,049,985 pounds. That covered shipments of sugar from

the American Sugar Refining Company and the American Sugar Refining Company of New York to W. H. Edgar & Son at Detroit during the month of May, 1904, by way of the North Shore Despatch. That claim amounted to $1524.99 and was paid by check. Exhibit 7 of this date now shown me is the cheque that was received by me in payment of that claim.

Claim 36690 covered shipments from the two refineries at New York to W. H. Edgar & Son at Detroit by the North Shore Despatch during the month of June, 1904, amounting to 1,798,020 pounds. The amount of the claim was $899.01. and was arrived at by multiplying the total tonnage by five cents after having divided it by 100. That claim was subsequently corrected from a 23 cent basis to a 21 cent basis because of a change in the tariff, and as corrected the amount is $539.40. That claim was paid by the cheque now shown me (Exhibit 8 of this date). I received that check in the letter now shown me.

(Letter marked for identification Exhibit 18.)

Claim 36876 covered shipments of sugar during July,
82 1904, to W. H. Edgar & Son at Detroit. The total tonnage was 2,384,325 pounds, and the claim was for $1192.16. It was paid.

Claim 37100 covered shipments to W. H. Edgar & Son in Detroit, in August, 1904, 2,564,767 pounds. It amounted to $1282.38 and was paid by check October 24, 1904. Exhibit 9 of this date is the check. I received it in the letter which is now in my hands.

(Letter marked for identification Exhibit 19 of this date.)

The check was for the amount of the total of the two claims about which I have just testified.

Claim 37,373 covered sugar shipments during September 1904 to W. H. Edgar & Son, Detroit. The total tonnage was 4,235,808 and the claim amounted to $2117.90. That claim was paid by check November 23, 1904. Exhibit 10 of this date is the check I received in payment of that claim.

Claim 37776 covered shipments of sugar to W. H. Edgar & Son, Detroit, in October 1904 via the North Shore Despatch. The total tonnage is 3,942,881 pounds and the amount of the claim is $1971.44. It was paid, December 28, 1904.

Counsel for the defendant corporation here admitted that Exhibit 11 was the check which was received in payment of this claim.

The WITNESS (continuing): These checks, Exhibits 7, 8, 9, 10 and 11 were deposited in the Market & Fulton National Bank in the account kept by Lowell M. Palmer. I presented a majority of these claims. They were presented by letter.

Further to maintain the issues on its part the Government called as a witness ALAN MCMICHAEL who testified:

83 During the year 1904 I was chief clerk to the defendant Fred L. Pomeroy. My office was in Mr. Pomeroy's office in the Grand Central Station. My duties were of a general nature, handling the details of the office. Mr. Pomeroy had a stenographer who did a good part of a private secretary's duties. I opened Mr. Pomeroy's mail. So far as I know it was the system of the office that all of the mail should pass through my hands and be opened by me.

The United States Attorney here offered in evidence the original letter of April 11, 1904, from the witness Palmer to the defendant Pomeroy, of which Exhibit 6 is a copy; the original being one of the letters produced by Mr. Pomeroy's counsel pursuant to the before mentioned notice.

Counsel for the defendant corporation conceded the authenticity of all the papers produced by the defendant Pomeroy, but objected to the competency of the proof upon each of the grounds urged against the admission of Exhibit 6. The objection was overruled and the letter was admitted and marked Exhibit 20. The defendant corporation excepted.

The United States Attorney then offered in evidence a letter dated July 14, 1904, addressed to F. L. Pomeroy signed "Lowell M. Palmer per Riley," being another of the letters produced by the defendant Pomeroy. Counsel for the defendant corporation objected to its admission as irrelevant, and on the ground that the declarations of the writer were irrelevant and inadmissible to bind the defendant corporation. The objection was overruled and the letter was received in evidence and marked Exhibit 21. The defendant corporation excepted.

84 The WITNESS (continuing): I do not recollect that individual letter. During the summer of 1904 there were some letters coming from Palmer to Pomeroy transmitting claims in regard to shipments of sugar to W. H. Edgar & Son of Detroit. I recall having seen such letters. To the best of my recollection these letters simply enclosed the claims. In all cases that I remember where a letter came purporting to contain an enclosure it did actually enclose a paper in the form of a claim. I saw Exhibit 5 before it was sent out of our office. I knew about it. I saw the original of the letter dated July 16, 1904, addressed to W. F. Wilson, General Manager, &c., Buffalo, N. Y., you now show me, when it was sent. It enclosed Lowell M. Palmer's claim No. 36476A.

The letter shown the witness, being another of the letters produced by the defendant Pomeroy, was offered in evidence. Counsel for the defendant corporation objected that the letter was incompetent and irrelevant against it for the reasons urged against the admission of Exhibits 20 and 21. The court overruled the objections and the defendant corporation excepted. The letter was admitted in evidence and marked Exhibit 22.

The WITNESS (continuing): The "A. McM." in Exhibit 22 are my initials. The initials "N. Y. C." means "New York Central" and the initials "M. C." means "Michigan Central." I do not remember the letter now shown me purporting to be a letter dated August 23, 1904, to Mr. F. L. Pomeroy, F. T. M., &c., signed "W. F. Wilson, General Manager, E." (Exhibit 13 for identification) I saw letters relating to the Edgar shipments coming from Wilson to Pomeroy during the summer of 1904. Those letters contained enclosures in the form of a draft and receipt. I cannot remember
85 the identical draft (Exhibit 7) now shown me, but I did see letters coming from Wilson with drafts in that tenor payable to L. M. Palmer during that summer. I have seen the original of the paper now shown me. being a carbon copy of a letter dated August 30, 1904, from the defendant Pomeroy to T. P. Riley produced by the defendant Pomeroy. It contains my initials. I saw a draft for this amount, but whether Exhibit 7 is the identical draft or not I could not say. The amount is similar and the date of the draft is similar to that mentioned in the letter, but that is the only means of identifying them. In that letter I mention the draft. As a matter of opinion, I have no doubt the draft mentioned in the letter and Exhibit 7 are the same.

The letter referred to by the witness dated August 23, 1904, from the witness Wilson to the defendant Pomeroy, being one of the papers produced by the defendant Pomeroy, was offered in evidence and was objected to by the defendant corporation upon the ground that it was incompetent and inadmissible to bind it. The objection was overruled and the defendant corporation excepted. The letter was admitted and marked Exhibit 13.

The WITNESS (continuing): The initials "J. S. E." at the bottom of that letter stand for J. S. Embleton.

The carbon copy of the letter of August 30, 1904, was offered and admitted in evidence and marked Exhibit 23, over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and the defendant corporation excepted.

The WITNESS (continuing): I have seen this carbon copy of a letter produced by the defendant Pomeroy, addressed to Mr. W. F. Wilson, Buffalo, dated September 1, 1904, signed F. L. Pome-
86 roy. I also saw this letter dated August 3, 1904, addressed to W. F. Wilson, produced by Mr. Pomeroy's counsel, at or about the time of its date.

Both papers were offered and admitted in evidence over the defendant corporation's objection that the same were incompetent and inadmissible to bind it, and were marked Exhibit 24 and 25 respectively. The defendant corporation excepted.

The WITNESS (continuing): At the time I saw Exhibit 25 the claim of Lowell M. Palmer, his number 36690 was enclosed in it. The original letter, Exhibit 24, was signed in the name of F. L. Pomeroy. I do not recall having seen this original letter dated

September 12, 1904, addressed to Mr. Pomeroy by Mr. Wilson, but there is no doubt but that I did at the time, and there is no doubt that at the time I saw it there was enclosed in it from Mr. Wilson a draft for a similar amount as Exhibit 8 and payable to the same person. When this letter addressed to Mr. T. P. Riley, signed "F. L. Pomeroy, McM." dated September 14, 1904, was mailed the Exhibit 8 was enclosed therein.

The two letters referred to by the witness were offered and admitted in evidence over the defendant corporation's objection that the same were incompetent and inadmissible to bind it, and were marked Exhibits 14 and 18 respectively. The defendant corporation excepted. Exhibit 14 was one of the papers produced by the defendant Pomeroy.

The WITNESS (continuing): "J. S. E." is John S. Embleton. I cannot recall the identical letter now shown me, which is an original letter dated September 15, 1904, addressed to Mr.
87 F. L. Pomeroy by Lowell M. Palmer *per* Riley, produced by Mr. Pomeroy's counsel, but there is no doubt but that it was received.

The letter referred to by the witness was offered and admitted in evidence over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and was marked Exhibit 26. The defendant corporation excepted.

The WITNESS (continuing): I saw this letter of September 16, 1904, addressed to Wilson by Pomeroy at the time of its date. There was enclosed with it a receipt for $539.40.

The letter referred to by the witness, which was one of the papers produced by the defendant Pomeroy was offered and admitted in evidence over the defendant corporation's objection that the same was incompetent and inadmissible to bind it; and was marked Exhibit 27. The defendant corporation rexcepted.

The WITNESS (continuing): I saw the original of this letter addressed to Mr. Wilson and signed Freight Traffic Manager on or about August 30, 1904. Lowell M. Palmer's claim, number 36876 was enclosed in it when it was mailed.

The paper referred to by the witness, which was one of those produced by the defendant Pomeroy was offered and admitted in evidence over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and was marked Exhibit 28. The defendant corporation excepted.

The WITNESS (continuing): I saw the original of this letter dated September 24, 1904, to Mr. W. F. Wilson at or about the time of its date. Lowell M. Palmer's claim number 37100 was enclosed in it.

88 The paper referred to by the witness, which was one of those produced by the defendant Pomeroy was offered and admitted in evidence over the defendant corporation's objection

that the same was incompetent and inadmissible to bind it, and was marked Exhibit 29. The defendant corporation excepted.

The WITNESS (continuing): I do not recall this letter to Mr. F. L. Pomeroy from Mr. Wilson, dated October 26, 1904, but I have no doubt I saw it at the time. I have seen this other letter dated October 28, 1904, and addressed to Mr. Lowell M. Palmer and signed "F. L. Pomeroy, McM." Mr. Pomeroy's letter to Mr. Palmer enclosed a draft for $2474.54 covering claims 37100 and 36876, for $1282.38 and $1192.16, respectively.

The two letters referred to by the witness were offered and admitted in evidence over the defendant corporation's objection that the same were incompetent and inadmissible to bind it, and were marked Exhibits 15 and 19 respectively, Exhibit 15 being one of the letters produced by the defendant Pomeroy. The defendant corporation excepted.

The WITNESS (continuing): I saw the original of this carbon copy of a letter from Mr. Pomeroy to Mr. Wilson dated October 31, 1904 about the time of its date. It enclosed a receipt.

The paper referred to by the witness, which was one of those produced by the defendant Pomeroy, was offered and admitted in evidence over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and the same was marked Exhibit 30. The defendant corporation excepted.

The WITNESS (continuing): I have seen this letter dated
89 October 22, 1904, from Mr. Pomeroy addressed to Mr. W. F. Wilson. Mr. Lowell M. Palmer's claim, No. 37373 was enclosed in it at the time.

The paper referred to by the witness, which was one of those produced by the defendant Pomeroy, was offered and admitted in evidence over the objection of the defendant corporation that the same was incompetent and inadmissible to bind it, and was marked Exhibit 31. The defendant corporation excepted.

The WITNESS (continuing): I do not recall this original letter addressed to Pomeroy by W. F. Wilson dated November 16, 1904, but it was undoubtedly received in our office. I identify this carbon copy of a letter from Mr. Pomeroy to Lowell M. Palmer, dated November 22, 1904. There was enclosed in these two letters, successively, a draft for $2117.90, but I cannot identify the particular draft. Exhibit 10 corresponds in name of payee, in date and in amount.

The two letters referred to by the witness, both of which were produced by the defendant Pomeroy, were offered and admitted in evidence over the defendant corporation's objection that the same were incompetent and inadmissible to bind it, and were marked Exhibits 16 and 32 respectively. The defendant corporation excepted.

The WITNESS (continuing): I saw this carbon copy of a letter

addressed "W.F.W." signed F. L. Pomeroy, November 25, 1904, about the time of its date. It enclosed a receipt.

The paper referred to by the witness, which was one of those produced by the defendant Pomeroy, was offered and admitted in evidence over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and was marked Exhibit 33. The defendant corporation excepted.

90 The WITNESS (continuing): I remember having seen the original of this letter from Pomeroy to Wilson, dated November 21, 1904, about the time of its date. It enclosed a claim of Lowell M. Palmer, his No. 37,776.

The paper referred to by the witness, which was one of those produced by the defendant Pomeroy, was offered and admitted in evidence, over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and was marked Exhibit 34. The defendant corporation excepted.

The WITNESS (continuing): I cannot identify this letter addressed by W. F. Wilson to Mr. Pomeroy, dated December 19, 1904, but the original of this carbon copy of a letter from Mr. Pomeroy to Lowell M. Palmer, dated December 23, 1904, was sent; and there was enclosed in these letters successively practically the same day, a draft in the form of Exhibit 11, for the same amount, to the order of L. M. Palmer and dated the same day as Exhibit 11.

The two papers referred to by the witness, both of which were produced by the defendant Pomeroy, were offered and admitted in evidence over the defendant corporation's objection that the same were incompetent and inadmissible to bind it, and were marked Exhibits 17 and 35 respectively. The defendant corporation excepted.

The WITNESS (continuing): I identify the carbon copy of a letter dated January 7, 1905, from Mr. Pomeroy addressed to Mr. Wilson. I saw it about the time of its date. It enclosed a receipt.

The paper referred to by the witness, which was one of those produced by the defendant Pomeroy, was offered and admitted
91 in evidence, over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and was marked Exhibit 36. The defendant corporation excepted. Another paper, also produced by the defendant Pomeroy, being a carbon copy of a letter signed by him addressed to Thomas F. Riley, dated August 12, 1904, was offered and admitted in evidence over the defendant corporation's objection that the same was incompetent and inadmissible to bind it, and was marked Exhibit 37. The defendant corporation excepted.

The defendant corporation, without waiving any of its objections to the admission of the various exhibits hereinbefore mentioned, here admitted that the original letters produced by the defendant Pomeroy were authentic letters received by him, and that the

carbon copies so produced were correct copies of letters which were written, signed and mailed by him to the persons addressed.

The witness being cross examined by Mr. Fox on behalf of the defendant corporation testified: I was nominally Mr. Pomeroy's chief clerk. He had no private secretary. I acted in that capacity also. Mr. W. H. Newman was the president of the company during the time to which my attention has been directed. Mr. Newman had a private secretary, named William Hutchinson, during all that time. There were other vice presidents of the defendant corporation besides Mr. Guilford, five I think, altogether, and I believe each one of them had a private secretary. There was also a board of directors, which I should think consisted of about twelve members, and which met in the Grand Central Station from time to time. The freight department with which Mr. Pomeroy was connected had agents of different rank and different authority in large numbers throughout the state, and who were engaged in handling the traffic of the company which was of very great volume and involved the making of a very large number of contracts and the carriage of a great many different kinds of freight. E. L. Rossitur was the treasurer of the company. I presume he had a private secretary.

92 Counsel for the defendant here admitted (solely for the purposes of the trial, however) that the check of the Merchants' Despatch Transportation Company before mentioned (which purchased the cashier's draft for $285.71 on the Metropolitan Trust Company by which Palmer's claim No. 36476 for the same amount was paid) was liquidated with funds of the defendant corporation; and that Exhibits 7, 8, 9, 10 and 11 were also liquidated by funds of the defendant corporation.

Both parties here rested, whereupon counsel for the defendant corporation moved that the jury be directed to render a verdict of acquittal as to it upon each of the following grounds:

1. The indictment is bad for misjoinder, as defendants, of the corporation and its two agents, for the same alleged acts or omissions.

2. The defendant corporation must be acquitted because of this misjoinder, it appearing from the evidence that the act or omission, or acts or omissions charged in the indictment are of such a character that the corporation and its agents could not, in law, be guilty of a joint offense in doing what is set forth in the indictment.

3. The offense or offenses charged in the indictment do not wholly arise from the joint action of the two defendants now on trial, and a joint indictment against them for the supposed acts therein charged cannot be sustained. For this misjoinder both are under the law entitled to an acquittal.

4. The indictment is so ambiguous and uncertain as to make it doubtful what is the exact offense intended to be charged. It therefore charges no crime, and is incapable of sustaining any verdict that the jury might render.

5. It is an essential element of the offense of offering or giving rebates, as defined by the Elkins Act that some advantage should have been thereby given or discrimination have been thereby practiced. The omission to directly allege this essential element cannot be supplied by intendment or implication, and the result of such omission is to render the indictment invalid.

6. The wilful failure of a carrier corporation strictly to
92½ observe the published tariff rates is one for which the offending corporation is, by the express terms of the statute, alone punishable.

7. The indictment cannot be regarded as a valid indictment for a wilful failure strictly to observe the published tariff rates since it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, either the corporation or the defendant Pomeroy wilfully failed strictly to observe the published tariff rates.

8. The indictment fails to charge any violation of the provisions of the statute relative to the observance of tariff rates in that it nowhere alleges any *wilful* failure strictly to observe them.

9. None of the counts charges the commission of acts which constitute an offense under the Elkins Act or under any other statute of the United States.

10. The facts proved by the evidence introduced on the part of the Government do not establish the commission of any crime by the defendant corporation.

11. The Elkins Act is unconstitutional and void in that it subjects carriers engaged in interstate commerce by means of the transportation of property from places in one state to places in another state by railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations, restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in interstate commerce in competition with such railway, or part railway and part water lines or routes by means of the transportation of the same kind of property between the same places, by means of water lines or routes.

12. The Elkins Act is unconstitutional and void in that it undertakes to punish the commission by the defendant Pomeroy of the acts set forth in the indictment solely by reason of his capacity and relationship to the corporation defendant as one of its agents or employees, while at the same time it wholly omits to forbid, much less provide any penalty for the commission of the same or similar acts by an employee or agent of a common carrier engaged in the transportation of similar property over a continuous line or route between the same places mentioned in the indictment entirely by water, or otherwise than by means of railroads, or partly by railroads and partly by rail and partly by water.

13. The said Act is unconstitutional and void in that it seeks to punish the defendant Pomeroy criminally for an individual
93 act or acts on his part, committed by him within the scope of his employment by the defendant corporation, and at the same time seeks to impute to the said corporation and punish

it for the same act or acts and thus impose a double punishment for the same act or acts, notwithstanding the corporation defendant did not and could not participate in such act or acts otherwise than by its agents or employees.

14. The indictment is bad for all the reasons set forth in the demurrer of the defendant.

15. The indictment is bad for all the reasons set forth in the motion to quash made before the empanelling of the jury and renewed after the jury had been sworn.

16. There is no evidence in the case to show that those who controlled or who were responsible for the corporate action of the defendant corporation, authorized or ever knew of any of the acts or alleged acts of the defendants Frederick L. Pomeroy or Nathan Guilford.

17. The provision of the Elkins Law in substance that the act of an agent shall be deemed also the act of the corporation is unconstitutional and void in that in involves, necessarily, the imputation of criminal intent if found in the agent directly to the corporation without any further proof, and operates to subject the corporation to criminal liability merely because of the commission of an unlawful act by an agent in the course of a lawful business entrusted to him by the corporation, and thus to inflict a punishment by way of penalty upon the stockholders of the corporation for the act of such agent."

The court denied the motion and the defendant corporation excepted.

Counsel for the defendant corporation then moved that the United States Attorney be required by the court to elect whether the case should go to the jury on the theory that the indictment charged the giving of rebates or on the theory that it charged a wilful failure strictly to observe the published tariff rates.

The court denied the motion and the defendant corporation excepted.

The United States Attorney here withdrew the first count of the indictment from the consideration of the jury.

Both parties having summed up the case, the court charged the jury as follows:

94 GENTLEMEN OF THE JURY: The defendants in this case have been indicted for the crime of giving rebates in violation of the Act of 1887, commonly called the Interstate Commerce Act, and the acts amending that act subsequently passed.

The Act of 1887 provided among other things, that there should be a list or schedule made up of the tariff rates by railroads engaged in interstate commerce over their own lines, or over their lines and other lines connecting with them, with which they had a joint traffic arrangement, and it provided that these schedules should be filed in the office of the Commissioner of Interstate Commerce and should be publicly exhibited about the stations of the several roads, and that there should be no advance or reduction made in the rates stated in these tariffs except after ten days notice in the case of an

advance and three days notice in the case of a reduction. The Act then provided that

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any point as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."

The Tenth Section of this Act provides:

"That any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or willingly suffer or permit any act, or matter or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor," and punished as provided in the act.

That act has been amended on several occasions, and notably was amended and in some respects superceded by the Act passed in 1903 commonly called the Elkins Act. You will recall in the provision as I have read it to you imposing and creating a misdemeanor, the provision that any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, should be punished, the effect of which was that a corporation which was a common carrier could not be criminally punished under the original act but only its officers and agents.

Now this Act commonly called the Elkins Act, passed in
95 1903, provided:

"That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons except as such penalties are herein changed."

* * * * * * *

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier

subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practised. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor."

This Act further provides:

"In construing and enforcing the provisions of this section"—the one which I have just been reading to you—"the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

Now Gentlemen this indictment contains seven counts. The first count has been withdrawn from your consideration by the District Attorney, and the question for you to pass upon in this case is whether these defendants or either of them—that is, whether the New York Central & Hudson River Railroad Company or Mr. Pomeroy, for the trial of this case has been severed and is

96 not now proceeding as against the defendant Nathan Guilford—it is for you to decide whether the New York Central & Hudson River Railroad Company or Mr. Pomeroy or both have been guilty of the distinct offenses alleged in each of the six counts of the indictment, the second, third, fourth, fifth, sixth and seventh.

Now the substantial facts charged in these counts are that the New York Central & Hudson River Railroad Company was a railroad company which had a joint traffic arrangement with the Michigan Central over which merchandise and freight was carried from New York to Detroit; that a firm named Edgar & Company, doing business at Detroit, were desirous of purchasing sugar from the American Sugar Refining Company, or the American Sugar Refining Company of New York, two companies engaged in the business of selling sugar and doing business here or in the neighborhood of New York. I think their refineries are, one of them at Brooklyn and one at Jersey City. Mr. Guilford was the traffic manager of the New York Central & Hudson River Railroad Company and Mr. Pomeroy, the other defendant, was the assistant traffic manager under him in the same office, assisting him in attending to the business of the traffic of the road.

The indictment alleges that Mr. Lowell M. Palmer as agent for these sugar companies and for Edgar & Company, applied to Mr. Guilford as agent of the New York Central & Hudson River Railroad Company, for a reduction on sugars to be shipped by these American Sugar Refining Companies to Edgar & Company at Detroit. That is, for a reduction in the rate below that stated in the tariff that had been filed with the Interstate Commerce Commission and published by the company. The indictment alleges that the rate as so fixed was 23 cents for every 100 pounds so carried, and that Palmer, as such agent for the sugar companies and for Edgar, the proposed purchaser, applied to the company to reduce it, and that thereupon the traffic manager, acting in behalf of the New York Central & Hudson River Railroad Company, entered into an arrangement by which they offered that upon all sugars which should thereafter be shipped by the American Sugar Refining Companies from Brooklyn or Jersey City to Edgar & Company at Detroit; they would pay a rebate of 5 cents for every 100 pounds on the full price that was to be paid, reducing the freight upon the sugars so shipped to the amount of 18 cents for every one hundred pounds.

Those are the substantial general allegations in respect to each of these counts, and then the second count charges that sugars were shipped under this arrangement for the remaining portion of the month of April and for the month of May 1904. The indictment charges that this offer was made on the 26th day of April and the second count alleges that sugars were shipped under this arrangement during the rest of the month of April and during the month of May; that the full price of 23 cents per 100 pounds was paid for the shipment of such sugars; that thereafter Mr. Palmer presented, as agent for the sugar companies and for Edgar, a claim for rebates, and that on August 31st, 1904, a claim which
97 he had presented amounting to $1,524.99 in respect to these April and May shipments, was repaid by or on behalf of the defendant the New York Central & Hudson River Railroad Company to Palmer as agent for the sugar companies and for Edgar.

The third count charges similar shipments in July and August; similar claims for rebate, and that on October 29th, 1904, there was repaid as such rebate the sum of $2474.54.

The fourth count charges that there were similar shipments in September, similar claim for rebate on account of them, and that on November 23rd, 1904, there was repaid as such rebate $2117.19.

The fifth count charges that there were similar shipments in October, similar claim for rebate, and that on December 28th there was repaid $1971.44. The sixth count charges somewhat differently in detail. It charges that during the month of June the schedule rate as published by the railroad company was 21 cents instead of 23 cents for every 100 pounds; and that shipments were made during that month and a claim for rebate made for 3 cents instead of 5 cents for every 100 pounds, and that pursuant to that claim on September 14th, 1904, $539.40 was repaid.

The Seventh Count charges that in April and May certain other

shipments were made which are not included in the April and May shipments mentioned in the second count, in respect to which on September 20th, 1904, a rebate of $285.71 was made.

Those are the substantial charges in the indictment, and I charge you, that under this Act, the payment of each rebate constitutes a distinct offense and that you may find by your verdict whether all or any of these offenses were committed by both or by either of these defendants. You may find that they are guilty in respect to all six of these offenses, or that one is and that the other is not, and you may find that either of them is guilty in respect to any one of these shipments if you can draw any distinction between them, and not guilty in respect to any other. The whole question is before you for determination.

Now the evidence which has been offered in this case, which I shall not refer to very fully, shows what the relations of these various parties was, and they have introduced in evidence a letter written by Mr. Palmer to Mr. Nathan Guilford dated April 11th, 1904, headed personal and confidential. You have heard that letter, gentlemen. It is a letter of some length and you will remember that it practically asked Mr. Guilford to make a reduction in the tariff rate on sugar to be shipped by these sugar companies to Edgar on the grounds stated in the letter; particularly that Edgar & Company threatened or proposed to ship their sugars by the canal or by the all-water route, at a considerably less rate.

That letter was replied to by Mr. Pomeroy in a letter dated April 26th, 1904; that is, 15 days after the date of Mr. Palmer's letter. This letter is headed private and confidential. It was written on the letter-head of the New York Central & Hudson River Railroad Company; has at the head of it F. L. Pomeroy, Assistant Traffic Manager and is addressed to Lowell M. Palmer, Esq. It begins as follows:

98 "DEAR SIR: Referring to your letter of April 11th, and my conversation over the 'phone yesterday, the 25th instant, with your Mr. Riley, which I understand was repeated to you and verified, all in regard to sugar shipments for W. H. Edgar & Son.

This is to advise that, taking effect immediately we will undertake to handle Edgar's shipments for Detroit and such shipments as are to be reforwarded from there to points on the Michigan Central R.R., at a rate of 18 (eighteen) cents per 100 lbs., New York to Detroit all-rail, shipments to be billed at tariff rates and refund made by voucher.

This arrangement is made in consequence of the through rate via canal and lake and rail and lake put in by the Detroit & Cleveland Navigation Co., in connection with the Michigan Central, Grand Trunk, Pere Marquette, and G. R. & I. roads, effective April 22nd, 1903, and which rates I understand have been renewed for the season of 1904."

There are other parts of the letter which it is not necessary to read.

Now the evidence shows that pursuant to that arrangement ship

ments immediately began that day, April 26th, of sugar to Edgar & Company over the lines of this defendant road. These shipments were paid for by the shipper, the American Sugar Refining Company, in advance. That is, the freight was paid in advance. Of course whether paid in advance or at the other end the payments presumably inure to the benefit of the purchaser, Edgar & Company. At all events the evidence is they were paid by the sugar companies in advance at the full tariff rate of 23 cents per 100 pounds in the case of all these months excepting June, in which the tariff rate was 21 cents and was paid.

Now, Gentlemen, if my quoting of this evidence does not consort with your recollection of it you are to be guided by your own recollection of it. I will endeavor to state it correctly. If I state it wrongly in any respects you will correct me.

The evidence shows that at the end of each month, that is, at the end of May, including the shipments made at the end of April, and at the end of each other month, clerks in the office of Mr. Palmer made up a claim to be repaid a certain sum of money, which they sent to the traffic manager; to Pomeroy I think most of the letters are addressed; at any rate, to either Mr. Pomeroy or Mr. Guilford. These traffic managers thereupon sent these claims out to the office of Mr. Wilson in Buffalo, who was an officer charged with the adjustment and attending to the payment of these claims. In his office this class of claims was in the hands of a man named Embleton. He examined them apparently and furnished a memorandum to the cashier of the amount for which drafts were to be purchased with which to pay these claims. The cashier thereupon went to the Bank of Buffalo, gave them his check for this amount and purchased from the Bank of Buffalo their cashier's check or draft on the Chemical Bank in favor of Palmer. Those drafts so purchased were sent back to Mr. Pomeroy's office, or Mr. Guilford's office occupied by Pomeroy and Guilford, and by them the drafts were sent to Palmer who returned the proper receipts for these payments.

99

It is unnecessary for me to go over more than perhaps in one case, to bring clearly the evidence before you. Here are the papers in relation to this second count. This is a letter from Lowell M. Palmer to F. L. Pomeroy dated July 14th, 1904:

"DEAR SIR: Referring to your favors of June 22nd and 23rd I beg to advise that our claims Nos. 36209 and 36251 have been cancelled on our record, and to take their place I now enclose our claims as follows:

Our No. 36476, Merchants' Despatch	$285.71
" 36476A, North Shore Despatch	1524.99

I believe these claims are now made up in accordance with your request, and I would thank you to put them through for prompt adjustment."

Then here is a letter from Pomeroy to Wilson:

"DEAR SIR: I hand you herewith claim of Lowell M. Palmer, his No. 36476A, for $1524.99 covering shipments of sugar consigned to W. H. Edgar, Detroit, via the N.S.D.

Please arrange to reduce the charges on these shipments to basis of 18c per 100 lbs. New York to Detroit, pro-rating on basis of earnings between the N.Y.C. and M.C. roads."

Then a letter from Wilson to Pomeroy, dated August 23rd, 1904:

"DEAR SIRS: Referring to your letter of July 16th enclosing claim of Lowell M. Palmer, his number 36476A, for $1524.99, I enclose herewith New York draft in favor of L. M. Palmer for this amount.

Please make settlement taking receipt upon the enclosed blank which I wish you would forward to me under personal cover."

Then here is the draft:

"BANK OF BUFFALO,
August 23*rd*, 1904.

Chemical National Bank, New York City

Pay to the order of L. M. Palmer, one thousand five hundred and twenty-four dollars and 99 cents."

Signed by the cashier and endorsed and deposited in the account of Mr. Palmer.

That was the manner substantially in which the evidence tends to show that the other payments were made.

Now, gentlemen, upon this evidence it is for you to say whether these defendants or either of them are guilty of these six offenses, or either of them.

100 This is a criminal prosecution. Intent must be necessary. An intention to do a criminal act is essential to the conviction of any person for a crime. There are cases, however, in which intent may be inferred from the act itself, and it will be a question for you in this case whether intent is not inferrable from the agreement contained in this letter of April 26th in which Mr. Pomeroy says: "This is to advise that taking effect immediately we will undertake to handle Edgar's shipments for Detroit and such shipments as are to be reforwarded from there to points on the Michigan Central Railroad, at a rate of 18 cents per 100 pounds New York to Detroit, all-rail, shipments to be billed at the tariff rates and refund made by voucher."

On this question of intent also, gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guilford was headed private and confidential. This letter from Pomeroy to Palmer is headed private and confidential. It will be proper for you to take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct check drawn at Buffalo by or on behalf of this defendant, was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical Bank in favor of Mr. Palmer; and you may take into

consideration upon that question the evidence in this case that the original claims presented by Palmer to Pomeroy and sent by Pomeroy to Wilson have been destroyed; and the fact that when Fmbleton, the man in charge of these shipments left the employment there a book containing entries in reference to these claims disappeared, and that Mr. Wilson testified in this case that he did not know where it was.

Now it is for you to say, gentlemen, whether these occurrences and these facts are consistent with innocence or with guilt, because if a man carries on an act, or any person does anything which upon its face is apparently unlawful, and he does it in a furtive and secret manner showing that his intention while he does the act is to do it in such a way as to conceal it, the jury may draw the inference from that fact, if they see fit,—they are not obliged to, but they may if they see fit—that the intention with which the act was done was to perform an illegal or a criminal act. And indeed, gentlemen, you may draw such an inference if you see fit, from the general nature of a rebate. If this was an honest transaction and there was a just reason why this railroad company should charge the American Sugar Company 18 cents a 100 instead of 23 cents per 100 on their shipments to Edgar, why did not they take checks in payment for the 18 cents a 100? What is the inference to be drawn when men carry on the business in this way of paying the full tariff rate and then months afterwards paying back a rebate for the simple purpose of accomplishing what they might have accomplished by sending a check in the first place for the difference? It is for you to say.

Now, gentlemen, this is a criminal prosecution. You must be satisfied of the guilt of these defendants beyond a reasonable doubt.

Those words mean just what they say—a reasonable doubt.
101 It does not mean a fastidious doubt or a fantastic doubt, or a doubt which a man gets up for the purpose of excusing himself for not doing his duty. It is not an unreasonable doubt; it is a reasonable doubt. If you have a reasonable doubt in this case of the guilt of these defendants or either of them, you will acquit them, but if you have not a reasonable doubt of their guilt, you will convict them."

Before summing up of counsel the defendant corporation submitted to the court certain written requests to charge. The same together with the court's rulings thereon are as follows:

1. That upon all the evidence it is the duty of the jury to render a verdict of not guilty.

The court refused so to charge and the defendant corporation excepted.

2. That in order to justify a verdict of guilty against this defendant it is not enough for the Government to prove that the defendant Pomeroy offered to give or did give rebates on sugar carried by this defendant.

The Court subsequently so charged as hereinafter appears.

3. That if the jury find as a fact that the evidence shows no more than this, that rebates on sugar carried by this defendant were given by the two defendants Guilford and Pomeroy without the knowledge

of this defendant's president, or executive officers, or directors or any officer beyond the two defendants Guilford and Pomeroy, then the defendant the New York Central & Hudson River Railroad Company should be acquitted.

The Court refused so to charge and the defendant corporation excepted.

4. That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that the defendants Guilford and Pomeroy gave rebates, but also that the giving of such rebates was in fact authorized by those who controlled the corporate action of the defendant corporation.

The Court refused so to charge and the defendant corporation excepted.

5. That in order to prove that this defendant corporation authorized the giving of rebates it is not enough for the Gov-
102 ernment to prove merely the giving thereof by Guilford and Pomeroy together with the fact that thereafter certain claims were presented and paid out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo.

Subsequently the Court so charged as hereinafter appears.

6. That even if the jury find as a fact that rebates were given by the defendants Guilford and Pomeroy, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except the defendant Guilford, then this defendant corporation must be acquitted.

The Court refused so to charge and the defendant corporation excepted.

7. That it is not for this defendant corporation to prove a negative and show that it did not authorize the giving of rebates, but it is for the Government to show such authority and to show it beyond a reasonable doubt, and no unfavorable inference must be drawn against this defendant corporation because it called no witnesses.

Subsequently the Court so charged as hereinafter appears.

8. That the burden of proof is not upon this defendant corporation to show affirmatively that no advantage was given in favor of a discrimination practised against any shipper or consignee other than those named in the indictment, but the burden of proof was upon the Government to show that fact, if it were true.

The Court refused so to charge and the defendant corporation excepted.

9. That the jury must not speculate, or guess on the question whether any advantage was given to or discrimination practised against any shipper or consignee other than those named in the indictment and if the jury find as a fact that there is no evidence one way or the other on that question, then this defendant corporation must be acquitted.

The Court refused so to charge and the defendant corporation excepted.

10. That the Government having failed to prove that any advantage was given to the firm of W. H. Edgar & Son or the American Sugar Refining Companies mentioned in the indictment, or discrimination was practised in their favor or against any
103 other shipper or consignee by reason of the giving of the alleged rebates, this defendant corporation must be acquitted.

The Court refused so to charge and the defendant corporation excepted.

11. That before the jury can find this defendant guilty of giving unlawful rebates, they must find as a fact from the evidence and find beyond a reasonable doubt that in the giving of the alleged rebates this defendant corporation did thereby give some advantage to the firm of Edgar & Son or the American Sugar Refining Companies mentioned in the indictment or practised some discrimination in their favor or against some other shipper or consignee.

The Court refused so to charge and the defendant corporation excepted.

12. That the element of advantage or discrimination is an essential element of the crime of giving rebates and as the indictment omits to allege this element it fails to charge a crime and this defendant corporation must be acquitted.

The Court refused so to charge and the defendant corporation excepted.

13. That even if the jury find a criminal intent in the defendant Pomeroy the jury cannot impute that intent to the defendant corporation.

The Court refused so to charge and the defendant corporation excepted.

14. That the jury cannot make a finding of criminal intent against the defendant corporation and base that finding solely on a finding of criminal intent against the defendant Pomeroy.

The Court refused so to charge and the defendant corporation excepted.

15. That the defendant corporation can in no event be convicted of a criminal intent to commit the crime of giving rebates.

The Court refused so to charge and the defendant corporation excepted.

16. That the defendant corporation cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity by direction of those controlling the corporate action it did or authorized the acts charged in the indictment and as there is no proof thereof, it must
104 be acquitted.

The court refused so to charge and the defendant corporation excepted.

17. That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant corporation authorized or knew of the giving of any unlawful rebates by Guilford and Pomeroy, then the defendant corporation must be acquitted.

The Court refused so to charge and the defendant corporation excepted.

18. That the defendants cannot be found guilty unless the evidence shows that sugar was carried for other shippers over the route named in the indictment on terms different from those given to the American Sugar Refining Company or Edgar.

The Court refused so to charge and the defendant corporation excepted.

19. That there is no evidence that sugars were carried for other shippers over the route between New York and Detroit named in the indictment on terms different from those on which the sugars mentioned in the indictment were carried.

Subsequently the Court so charged as hereinafter appears.

20. That the jury cannot find the defendant corporation guilty upon a finding that the corporation, after the fact, ratified or approved of the giving of alleged rebates.

The Court refused so to charge and the defendant corporation excepted.

21. That even if the jury find as a fact that the defendants Guilford and Pomeroy gave rebates as alleged in the indictment and that thereafter such rebates were paid by or through other agents of the defendant corporation in Buffalo, still those facts are not sufficient to warrant a verdict of guilty against the defendant.

The Court refused so to charge and the defendant corporation excepted.

22. That there is no evidence that those who controlled the corporation authorized or knew of the giving of the rebates alleged in the indictment.

Subsequently the Court charged this request, with certain additions or modifications as hereinafter *ap*appears.

105 23. That there is no evidence that the defendant corporation or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the Government has asked.

Subsequently the Court so charged as hereinafter appears.

24. The provision of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury.

The Court refused so to charge and the defendant corporation excepted.

25. That there is no presumption that any other shipper was refused the same rate that was given to the firm of Edgar & Son or the Sugar Refineries mentioned in the indictment.

Subsequently the Court so charged as hereinafter appears.

26. That if the jury find that the essential nature of the rebates alleged to have been given was deceit and secrecy and that as a matter of fact the giving thereof was kept secret from those who controlled the corporate action of the defendant corporation, then that the defendant must be acquitted.

The Court refused so to charge and the defendant excepted.

27. That in order to find that the defendant Comeroy or Guilford was acting within the scope of his employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent had authority to establish lawful rates, but must find also that such agent had authority to make the unlawful rates alleged in the indictment.

The Court refused so to charge and the defendant excepted.

Before the jury retired and in their presence, counsel for the defendant corporation excepted to that portion of the charge wherein the Court instructed the jury, in substance and effect, that the indictment set forth six distinct offenses, that the payment of each
106 alleged rebate separately set forth in the various counts constituted a distinct offense, and that it was for the jury to say whether the defendants, or either of them have been guilty of these six offenses, or either of them; also to that portion of the charge wherein the court instructed the jury, in substance an effect, that they might take into consideration on the question of the intent of the defendants, the evidence that the original claims presented by Palmer to Pomeroy, and sent by Pomeroy to Wilson had been destroyed; also to that portion of the charge in which the court instructed the jury, in substance and effect, that they might take into consideration on the question of the intent of the defendants the fact that at the time Embleton went away a book containing entries in reference to Palmer's claims had disappeared, and that the witness Wilson testified that he did not know where it was; also to that portion of the charge wherein the court instructed the jury, in substance and effect, that there are cases in which an intent may be inferred on the part of a corporation from the act of an agent, and it was for the jury to say whether such intent was not in this case inferrable from the letter from Pomeroy itself; also to that portion of the charge wherein the court instructed the jury, in substance and effect, that it was competent for the jury to take into consideration on the question of the criminal intent of the corporation the method in which the transaction was carried on by Pomeroy and Guilford, and especially to that portion of the charge in that connection in which the jury was instructed that the jury could draw the inference of criminal intent on the part of the corporation from the use of the words "Private and Confidential" by Pomeroy; also to that portion
107 of the charge wherein the court instructed the jury in substance and effect, that in considering the question of criminal intent on the part of the corperation the jury might take into consideration the method of making payments employed by its agents; that instead of making direct payments by check, drafts were bought in Buffalo and sent to Palmer; also to that portion of the charge wherein the court instructed the jury, in substance and effect, that they might consider on the question of the criminal intent of the corporation, that if a person does anything which on the face of it is apparently lawful, and does it in a stealthy manner with the intention to conceal, then the jury might infer that his intention was to do an illegal act; also to that portion of the charge wherein the court instructed the jury, in substance and effect, that they might,

if they saw fit, draw from the general nature of a rebate the inference that the intent with which the act was done was to perform an illegal or criminal act; also to that portion of the charge in which the court used the following language: "If this was an honest transaction and there was a just reason why the railroad company should charge the American Sugar Company eighteen cents a hundred instead of twenty-three cents per hundred on their shipments to Edgar, why did they not take cheques in payment for the eighteen cents a hundred?"

Counsel for the defendant corporation then requested the court to charge further: "Criminal intent on the part of the corporation cannot be inferred solely and merely from the fact that a rebate was given as charged in the indictment, if the jury find that such rebate was given."

The court refused so to charge, and instructed the jury, in lieu thereof: "A repayment may be made for an overcharge which has no element of crime about it, of course. It is done every day.
108 There may be a payment which might be called a rebate, but a rebate within the sense of the Act, that is a portion paid back without any consideration out of the full tariff price paid for the carriage of goods is not an innocent transaction under the Act, and is expressly prohibited by it."

Counsel for the defendant corporation excepted to court's refusal to charge as requested, and to the instruction given in lieu thereof, and stated that the point of the request was that the jury should be charged that a criminal intent on the part of the corporation could not be inferred solely and merely from the fact that the jury might find that a rebate was given as charged in the indictment.

The court declined so to charge, and instructed the jury:

"It is for the jury to say whether the corporation pays back a rebate intending to pay it as a rebate. It is for the jury to say whether it is intended to violate the law or not."

At the request of the defendant corporation the court charged the jury further, that the mere fact that letters by Pomeroy bore the letter-head of New York Central and Hudson Railroad Company was not of itself evidence of knowledge by those controlling the corporate action of any unlawful act on the part of either Pomeroy or Guilford.

The jury then retired. Having subsequently communicated to the court a request for a copy of the Elkin's Act, the jury was by direction of the court recalled to the court room. By consent of counsel for both parties a pamphlet containing a copy of the Elkin's Act was handed to the foreman. The court then charged the jury further as follows:

109 "These are the requests to charge for the New York Central and Hudson River Railroad Company:

"(2) 'That in order to justify a verdict of guilty against this defendant it is not enough for the government to prove that the defendant Pomeroy offered to give, or did give rebates on sugar carried by this defendant.' I so charge. There might be rebates given for a legitimate purpose."

"(5) 'That in order to prove that this defendant corporation authorized the giving of rebates it is not enough for the Government to prove merely that the giving thereof by Guilford and Pomeroy together with the fact that thereafter certain claims were presented and paid out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo.' I so charge. It might take place in an honest way."

"(7) 'That it is not for this defendant corporation to prove a negative and show that it did not authorize the giving of rebates, but it is for the Government to show such authority and to show it beyond a reasonable doubt, and no unfavorable inference must be drawn against this defendant corporation because it called no witnesses.' I shall charge the first part of that. Yes, I charge the whole of it."

"(9) 'That the jury must not speculate, or guess on the question whether any advantage was given to or discrimination practised against any shipper or consignee other than those named in the indictment and if the jury find as a fact that there is no evidence one way or the other on that question, then this defendant corporation must be acquitted.' I refuse to charge that. I did not notice the last sentence when I marked it."

Mr. Fox: Exception taken.

The Court (continuing): "The mere fact about discrimination is not decisive. The question here is whether they paid a rebate in a reduction of the legal rate."

"(19) 'That there is no evidence that sugars were carried for other shippers over the route between New York and Detroit named in the indictment on terms different from those on which the sugars mentioned in the indictment were carried.' There is no evidence on the point I think."

"(22) 'That there is no evidence that those who controlled the corporation authorized or knew of the giving of the rebates alleged in the indictment.'" If that means the president and directors, I think there is no evidence, affirmative evidence on that subject. I leave that matter however, as a matter upon which the jury are to pass upon a consideration of all the evidence in the case.

Mr. Fox: Exception taken to the modification.

The Court (continuing): "(23) 'That there is no evidence that the defendant corporation or those who controlled its corporatee action destroyed or failed to produce upon the trial any paper for which the Government was asked.'" I so charge.

"(25) 'That there is no presumption that any other shipper was refused the same rate that was given to the firm of Edgar & Son or the Sugar Refineries mentioned in the indictment.'"

110 There is no other evidence as I recall it.

Mr. Fox: Your Honor charges that proposition, then?

The Court: Yes.

Mr. Stimson: Will you make the statement as to that that the question in this case is whether or not the rebate created a departure from the published tariff, and not whether there was any discrimination against any one else?

The COURT: I have already charged that. Now is that all, Gentlemen?

Mr. FOX: Your Honor has charged all that you marked to be charged?

The COURT: Yes.

Counsel for the defendant corporation excepted to the Court's modification of the 19th request.

Counsel for the defendant corporation further excepted to the addition or modification made to the 22nd request by the court; and to the charge of the court in that connection to the effect that it was a question for the jury on the evidence in the case whether or not there was evidence that those who controlled the corporation authorized, or knew of the giving of the rebates alleged in the indictment.

The jury retired and having agreed upon a verdict again returned to the court room. The foreman being asked by the clerk whether the jury had agreed upon a verdict, stated that they had and that they found both of the defendants guilty of rebating on all the counts of the indictment from the second down to the seventh inclusive.

The court was duly adjourned to Friday, October 19th, 1906, on which day the defendant corporation moved that the court set aside the verdict and grant the defendant a new trial for each of the following causes:

First. The court erred in denying this defendant's motion to quash and dismiss the indictment for the misjoinder herein as defendants of the said Fred L. Pomeroy and Nathan Guilford, with this defendant; to which denial this defendant duly excepted.

111 Second. The court erred in denying this defendant's motion made after the jury was empaneled and before any evidence had been introduced, that the United States Attorney be required to elect as to whether he should proceed with the trial upon the theory that the indictment charged the giving of unlawful rebates in violation of the Elkins Act, or upon the theory that it charged a wilful failure strictly to observe the published tariff rates in violation of that Act; to which denial this defendant excepted.

Third. The court erred in denying this defendant's motion made at the close of the evidence, that the jury be directed or advised to acquit this defendant for the reasons set forth and stated at length in the said last mentioned motion; to which denial this defendant duly excepted.

Fourth. The court erred in denying this defendant's motion made at the close of the case and before the summing up of counsel, to require the United States Attorney to elect as to whether the case should be submitted to the jury upon the theory that the indictment charged the giving of rebates, or that it charged a wilful failure strictly to observe the published tariff rates; to which denial this defendant duly excepted.

Fifth. The court misdirected the jury in divers matters of law; to each of which misdirections this defendant duly excepted.

Sixth. The court erred in refusing to charge this defendant's requests to charge, in the form in which the same were requested, in

its modifications of the said requests, and in charging the same as so modified; to each of which refusals, modifications and instructions, as so modified, this defendant duly excepted.

Seventh. The court erred in refusing to charge this defendant's requests to charge; to each of which refusals to charge this defendant duly excepted.

Eighth. The verdict of the jury is contrary to law.

The court denied the motion and the defendant corporation excepted.

The defendant corporation then moved in arrest of judgment, as appears by the record, and that motion having been denied, the court sentenced the defendant Pomeroy, for each of the six offenses of which he had been convicted, to pay a fine of one thousand dollars, making six fines, amounting in all to the sum of six thou-
112 sand dollars, and sentenced the defendant corporation, for each of the six crimes of which it had been convicted, to pay a fine of eighteen thousand dollars, making six fines, amounting in the aggregate to the sum of one hundred and eight thousand dollars; and directed that judgment be entered accordingly.

The court thereupon granted the defendant corporation a stay of sixty days in which to make and serve a case of exceptions, which stay was thereafter duly extended to and including the day of the allowance and settlement of this Bill of Exceptions, for which purpose the said October Term (1906) of this court was duly extended.

Exhibits referred to in the foregoing case.

EXHIBIT 5

consisted of the original letter, dated April 26, 1904, Fred L. Pomeroy to Lowell M. Palmer, a copy of which is set worth in the written stipulation first herein mentioned.

EXHIBIT 6

consisted of a letter-press copy of Exhibit 20 (letter dated April 11, 1904, Lowell M. Palmer to "Mr. Nathan Guilford, Traffic Manager," &c.)

EXHIBIT 7.

Bank of Buffalo. No. A28964.

BUFFALO, N. Y., *Aug.* 23, 1904. $1524.99.

Chemical National Bank, New York City,

Pay to the order of L. M. Palmer, fifteen hundred and twenty-four and 99/100 dollars.

Not over two thousand.

J. L. DANIELS, *Cashier,*
By H. J. DUNN.

Endorsed: Pay to the order of The Market & Fulton National Bank, Lowell M. Palmer. Market & Fulton National Bank,
113 Received payment through N. Y. Clearing House, Aug. 31, 1904. Receiving Teller.

EXHIBIT 8.

Bank of Buffalo. No. A30095.

BUFFALO, N. Y., *Sept.* 12, 1904. $539.40.

Pay to the order of L. M. Palmer Five hundred thirty-nine and 40/100 Dollars.
Not over Six Hundred Dollars.

J. L. DANIELS, *Cashier,*
By H. J. DUNN.

Endorsed: Pay to the order of The Market & Fulton National Bank, Lowell M. Palmer. Market & Fulton National Bank Received Payment through *Sept. 15, 1904,* N. Y. Clearing House, Receiving Teller.

EXHIBIT 9.

Bank of Buffalo. No. A-32852.

BUFFALO, N. Y., *Oct.* 26, 1904. $2474.54.

Chemical National Bank, New York City,

Pay to the order of L. M. Palmer, Twenty-four hundred and seventy-four and 54/100 Dollars.
Not over Three Thousand.

J. L. DANIELS, *Cashier,*
By H. J. DUNN.

Endorsed: Pay to the order of The Market & Fulton National Bank. Lowell M. Palmer. Market & Fulton National Bank, Received payment Oct. 29, 1904, through N. Y. Clearing House. Receiving Teller.

114 EXHIBIT 10.

Bank of Buffalo. No. A-34412.

BUFFALO, N. Y., *Nov.* 19, 1904. $2117.90.

Chemical National Bank, New York City,

Pay to the order of L. M. Palmer, Twenty-one hundred seventeen and 90/100 Dollars.
Not over Twenty-five hundred $2500.

J. L. DANIELS, *Cashier,*
By H. J. DUNN.

Endorsed: Pay to the order of the Market & Fulton National Bank. Lowell M. Palmer. Market & Fulton National Bank. Received payment Nov. 23, 1904, through the N. Y. Clearing House. Receiving Teller.

EXHIBIT 11.

Bank of Buffalo. A36336.

BUFFALO, N. Y., *Dec.* 19, 1904. $1971.44.

Chemical National Bank, New York City,

Pay to the order of L. M. Palmer, Nineteen hundred Seventy-one and 44/100 Dollars.
Not over Two Thousand.

J. L. DANIELS, *Cashier,*
By H. J. DUNN.

Endorsed: Pay to the order of The Market & Fulton National Bank. Lowell M. Palmer. Received payment, through N. Y. Clearing House, Dec. 29, 1904, Market & Fulton National Bank. Receiving Teller.

EXHIBIT 13.

New York Central and West Shore Fast Freight Lines.

General Manager's Office.

W. F. Wilson, General Manager.

BUFFALO, N. Y., *August* 23, 1904.

Personal.

North Shore Despatch.

115 *Voucher* 4, *July,* 1904, *Account.*

Mr. F. L. Pomeroy, F. T. M., N. Y. C. & H. R. R. R., New York City, N. Y.

DEAR SIR: Referring to your letter of July 16th, enclosing claim of Lowell M. Palmer, his Number 36476-A for $1524.99 I enclose herewith New York Draft in favor L. M. Palmer for this amount.

Please make settlement taking receipt upon the enclosed blank which I wish you would forward to me under personal cover. Obliging,

Yours truly,

W. F. WILSON,
General Manager.

J. S. E. E.

EXHIBIT 14.

The New York Central and West Shore Fast Freight Lines.

General Manager's Office.

W. F. Wilson, General Manager.

BUFFALO, N. Y., *Sept.* 12, 1904.

Personal.

North Shore Despatch.

Voucher 2, *August*, 1904, *Account.*

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Sep 14 1904
Office of Freight Traffice Manager.

Mr. F. L. Pomeroy, F. T. M., N. Y. C. & H. R. R. R., New York City, N. Y.

DEAR SIR: Herewith please find New York Draft in favor of L. M. Palmer, amounting to $539.40, in settlement of his claim Number 36690.

This claim was sent to my office with your personal letter of August 3rd, second time, August 20th, with bill reduced to the above amount.

Please take Mr. Palmer's receipt upon the enclosed blank
116 forwarding same to my office, and greatly oblige.

Yours truly,

W. F. WILSON,
General Manager.

J. S. E.

E.

EXHIBIT 15.

New York Central and West Shore Fast Freight Lines.

General Manager's Office.

W. F. Wilson, General Manager.

BUFFALO, N. Y., *October* 26, 1904.

Personal.

North Shore Despatch.

Vouchers 1 & 2, *September*, 1904, *Acc't.*

N. Y. C. & H. R. R. R.
W. S. R. R.
Oct 28, 1904
Office of Freight Traffic Manager.

Mr. F. L. Pomeroy, F. T. M., N. Y. C. & H. R. R. R., New York City, N. Y.

DEAR SIR: Herewith please find New York Draft in favor of L. M. Palmer for $2474.54, in settlement of his claims, numb

37100 and 36876, for $1282.38 and $1192.16 for overcharge on shipments of W. H. Edgar & Son, Detroit, Mich.

Please let me have Mr. Palmer's receipt upon the enclosed blank.

Yours truly,

W. F. WILSON,
General Manager.

J. S. E. E.

EXHIBIT 16.

New York Central and Hudson River Railroad Company.

General Manager's Office.

W. F. Wilson, General Manager.

Personal. BUFFALO, N. Y., *November* 19, 1904.

N. S. Despatch.

Voucher 1, *October*, 1904, *Account.*

117

N. Y. C. & H. R. R. R.
W. S. R. R.
Nov 21, 1904
Office of Freight Traffic Manager.

Mr. F. L. Pomeroy, F. T. M., N. Y. C. & H. R. R. R., New York City, N. Y.

DEAR SIR: Herewith I hand you New York Draft in favor of L. M. Palmer for $2117.90 in settlement of his claim #37373, referred to this office with your letter of October 22nd.

Please let me have Mr. Palmer's receipt upon enclosed blank, and oblige,

Yours truly,

W. F. WILSON,
General Manager.

J. S. E. E.

EXHIBIT 17.

New York Central and West Shore Fast Freight Lines.

General Manager's Office.

W. F. Wilson, General Manager.

Personal. BUFFALO, NEW YORK, *December* 19, 1904.

North Shore Despatch.

Voucher 2, *November*, 1904, *Account.*

Mr. F. L. Pomeroy, F. T. M.; N. Y. C. & H. R. R. R., New York City, N. Y.

DEAR SIR: Herewith I hand you New York Draft in favor of L. M. Palmer for $1971.44 in settlement of his claim No. 37776, presented through your office.

Please let me have his receipt upon the enclosed blank.

Yours truly,

W. F. WILSON,
General Manager.

E.

J. S. E.

EXHIBIT 18.

New York Central & Hudson River R. R. Co.

West Shore Railroad.

Grand Central Station.

AMcM-P.

F. L. Pomeroy, Freight Traffic Manager; Francis La Bau, Ass't Freight Traffic Manager.

NEW YORK, *Sept.* 14*th*, 1904.

Personal.

Mr. T. P. Riley, c/o L. M. Palmer, 184 Front Street, City.

DEAR SIR: I enclose herewith N. Y. C. draft in favor of Lowell M. Palmer for $539.40 in settlement of your claim 36690.

Please sign enclosed receipt and return to me promptly.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

U. S.

EXHIBIT 19.

New York Central & Hudson River R. R. Company.

West Shore Railroad.

Grand Central Station.

Personal. P.

NEW YORK, *Oct.* 28, 1904.

Mr. Lowell M. Palmer, 184 Front Street, City.

DEAR SIR: I hand you herewith New York draft in your favor for $2,474.54 covering your claims 37100 and 36878 for $1,282.38 and $1,192.16 respectively, account of sugar shipments to Detroit.

Please sign enclosed receipts and return to me promptly.

119 Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

By express.

EXHIBIT 20.

Office of Lowell M. Palmer, 184 Front Street,

NEW YORK, *April* 11, 1904.

Personal and *confidential.*

Mr. Nathan Guilford, Traffic Manager, N. Y. C. & H. R. R. R., New York City.

DEAR SIR: A very serious state of affairs seems to threaten us in regard to shipments of sugar for W. H. Edgar & Son, Mr. Edgar's son called on me last week with a proposition to the effect that they would like this season to have their shipments of sugar made from New York by canal to Buffalo, we prepaying charges up to that point only. They state that they have an arrangement with the Detroit & Buffalo Line to take the sugars at Buffalo for distribution to Detroit and Edgar's other points in Michigan.

I wrote Mr. James Edgar on April 6th in regard to this matter, as per copy of my letter attached, and I beg to call your attention to his reply of April 8th. They figure that they can land sugars in Detroit, via canal to Buffalo and thence via D. & B. Line, for say 13 cents per cwt., which rate is divided 7 cents to Buffalo, one cent for handling at that point, and five cents per cwt. for the D. & B. Line haul to Detroit.

I enclose also, for your personal information and to be returned to me without fail, Detroit & Cleveland Navigation Company's
120 tariff I C C 66, showing rates on sugar from Cleveland to various points in Michigan, applying on sugar originating at eastern points and received from the Lake Lines at Cleveland. The D. & C. Navigation Co., as you understand, is the same as the Detroit & Buffalo Line, and Edgar states that he has an arrangement with Mr. McIntyre to apply beyond Detroit the rates mentioned in the right hand column of the tariff, less the proportion between Cleveland and Detroit, of 4½ cents. This would give Edgar a through rate, to Grand Rapids, for instance, of 17½ cents. Edgar is in a very trying position in the state of Michigan, with the severe competition that he is experiencing with the Michigan beet sugars and with Arbuckle Brothers, and it seems quite certain, from the position he has taken, that something must be done for him in the way of rates this season. I think, if we could arrange to give him a net rate all rail, of 18 cents per cwt. to Detroit and the same relative basis to other Michigan points, that we could make an arrangement with him whereby these shipments would be confined strictly to the New York Central and West Shore Fast Freight Lines throughout the entire year. If some arrangement of this kind cannot be made, it is quite certain that Edgar's business will be put on the canal and rate arranged on it by himself beyond Buffalo. If such a course is pursued, it will simply mean the disintegration of the present understanding for the division of the sugar traffic, as, if a large shipper

like Edgar is permitted to make his own rates, it will only be a very short time before every other large wholesale grocery house in the United States will want the same privilege.

As you can easily see, this is a matter of the most vital
121 importance, not only to us but to the railroad companies, and I sincerely trust that you will see your way clear to giving us authority to make such an arrangement with Edgar as will confine his business to the all-rail route.

Please be kind enough to see that the D. & C. N. Co.'s tariff is returned to my hands, as it is the only one that I have. In order to help out in this matter, and to keep Edgar's sugar off the canal, I on my part would be willing to accept on their shipments 3 cents per cwt. instead of the regular 4 1/5 cents.

You understand that, before the time that sugar was put into fifth class, the rate to Detroit by the standard lines was 20 cents per cwt. as against the differential line rate of 18 cents, and if this latter figure can again be secured for them, I am quite hopeful that we can make a satisfactory arrangement with Edgar which will do away with his demands for canal-and-lake shipment.

Yours very truly, LOWELL M. PALMER.

EXHIBIT 21.

Office of Lowell M. Palmer, 184 Front St.

Personal. NEW YORK, *July* 14, 1904.

Mr. F. L. Pomeroy, F. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: Referring to your favors of June 22nd, and 23rd: I beg to advise that our Claims Nos. 36209 and 36251 have been cancelled on our records, and to take their place I now enclose our claims as follows:

Our No. 36476, Merchants Despatch.....	$285.71
122 Our No. 36476-A North Shore Despatch,.....	1524.99

I believe these claims are now made up, in accordance with your request, and I would thank you to put them through for prompt adjustment.

Yours very truly,

LOWELL M. PALMER,
Per RILEY.

Enc.

EXHIBIT 22.

Personal. A. McM. "P."

JULY 16, 1904.

Mr. W. F. Wilson, General Manager, N. Y. C. & W. S. F. F. Lines, Buffalo, N. Y.

DEAR SIR: I hand you herewith claim of Lowell M. Palmer, his No. 36476-A for $1524.99 covering shipment of sugar consigned to W. H. Edgar, Detroit, via the N. S. D.

Please arrange to reduce the charges on these shipments to basis of 18¢ per 100 lbs. New York to Detroit, prorating on basis of earnings between the N. Y. C. and M. C. roads.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

Enc.

EXHIBIT 23.

Personal. A. McM.

AUG. 30, 1904.

Mr. T. P. Riley, c/o L. M. Palmer, 184 Front St., N. Y.

DEAR SIR: I hand you herewith draft for $1524.99 in favor of L. M. Palmer covering your claim No. 36476-A. Kindly
123 sign enclosed receipt and return to me promptly.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

EXHIBIT 24.

Personal. P.

NEW YORK, *Sept. 1st,* 1906.

Mr. W. F. Wilson, Buffalo, N. Y.

DEAR SIR: Your letter August 23rd. I return herewith receipt for $1524.99 duly signed by Mr. L. M. Palmer.

F. L. POMEROY.

U. S.

EXHIBIT 25.

Personal. A. McM.

NEW YORK, *Aug.* 3, 1904.

Mr. W. F. Wilson, G. M. N. Y. C. & W. S. F. F. Lines, Buffalo, N. Y.

DEAR SIR: I enclose with this claim of Lowell M. Palmer, his number 36690, amounting to $899.01, covering shipments of sugar consigned to W. H. Edgar, Detroit, via North Shore Despatch, during the month of June, 1904. Please arrange to reduce the charges on these shipments to the basis of 18¢ per 100 lbs. from New York to Detroit, prorating on basis of earnings between the New York Central and Michigan Central roads.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

EXHIBIT 26.

Personal.

Office of Lowell M. Palmer, 184 Front Street,

NEW YORK, *Sept.* 15, 1904.

124 Mr. F. L. Pomeroy, F. T. M. New York Central & Hudson River R. R. Co., Grand Central Station, City.

DEAR SIR: I am in receipt of your favor of the 14th, enclosing draft in my favor for $539.40, in settlement of our claim #36690, and beg to hand you receipt for same herewith.

In this connection I would like to call your attention to the fact that our claim #36475, covering Edgar's Merchants' Despatch shipments in May & June, amounting to $285.71, which was presented on July 7th last, has not as yet been paid. Won't you kindly stir up the M. D. T. in regard to this particular claim, and very much oblige.

Yours very truly,

LOWELL M. PALMER,
Per RILEY.

T. P. R./S.

EXHIBIT 27.

Personal. A. McM.—P. (P.)

NEW YORK, *September* 16*th*, 1904.

Mr. W. F. Wilson:

Your letter September 12th in North Shore Despatch Voucher 2, August 1904 account.

I return herewith receipt for $539.40, signed by Mr. Palmer.

F. L. POMEROY.

EXHIBIT 28.

Personal. A. McM. "P."

NEW YORK, *Aug.* 30, 1904.

Mr. W. F. Wilson, Buffalo, N. Y.

DEAR SIR: I hand you herewith claim of L. M. Palmer,
125 his number 36876, for $1192.16, covering shipments of sugar consigned to W. H. Edgar & Son, Detroit, via North Shore Despatch, during the month of July. Please arrange to reduce the charges on these shipments to basis of 18¢ per 100 lbs., New York to Detroit, prorating on basis of earnings between the New York Central and Michigan Central roads.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

EXHIBIT 29.

Personal. A. McM.—P. (P.)

NEW YORK, *September* 24*th*, 1904.

Mr. W. F. Wilson, General Manager Fast Freight Lines, Buffalo, N. Y.

DEAR SIR: I enclose herewith claim from Lowell M. Palmer, his No. 37100 for $1282.38 covering shipments of sugar consigned to W. H. Edgar & Son, Detroit, via North Shore Despatch during the month of August.

Please arrange to reduce the charges on these shipments to basis of 18¢ per 100, from New York to Detroit, pro-rating on basis of earnings between New York Central and Michigan Central Railroad.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

EXHIBIT 30.

Memorandum.

Personal. A. McM.

NEW YORK, *Oct.* 31, 1904.

W. F. Wilson, Buffalo, N. Y.

126 DEAR SIR: Referring to your letter of October 26th and returning herewith receipts signed by Mr. Palmer for $1282.38 and $1192.16, respectively, covering sugar for W. H. Edgar & Son, Detroit, Mich.

F. L. POMEROY.

EXHIBIT 31.

Personal.

NEW YORK, *Oct.* 22, '04.

Mr. W. F. Wilson, Gen'l Man'g'r F. F. Lines, Buffalo, N. Y.

DEAR SIR: I hand you herewith Lowell M. Palmer's claim 37373 covering shipments of sugar consigned to W. H. Edgar & Son Detroit via West Shore Despatch during the month of September amounting to $2,117.90.

Please arrange to reduce charges on this shipment to basis of 18¢ per 100 lbs. from N. Y. to Detroit, prorating on basis of earnings between N. Y. Central and Michigan Central.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

EXHIBIT 32.

Personal. A. McM.

Nov. 22, 1904.

Mr. Lowell M. Palmer, 184 Front Street, New York.

DEAR SIR: I hand you herewith New York Draft in your favor for $2117.90 in settlement of your claim 37373 covering
127 shipments of sugar consigned to W. H. Edgar & Son, Detroit. Kindly sign enclosed receipt and return to me promptly.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

Registered mail.

EXHIBIT 33.

Personal. S. A. McM.

NEW YORK, *Nov.* 25, 1904.

W. F. W.:

Your letter November 19th, North Shore Despatch voucher No. 1 October 1904, account. I return herewith receipt signed by Mr. Palmer for $2117.90.

F. L. POMEROY.

EXHIBIT 34.

Personal. S. A. McM.

NEW YORK, *Nov.* 21, 1904.

Mr. W. F. Wilson, G. M. Fast Freight Lines, Buffalo, N. Y.

DEAR SIR: I hand you herewith claim from Lowell M. Palmer, his number 37776, for $1971.44, covering shipments of sugar consigned to W. H. Edgar & Son, Detroit, via the North Shore Despatch, during the month of October, 1904.

Please arrange to reduce the charges on these shipments to the basis of 18¢ per 100 lbs. from New York to Detroit, prorating on basis of earnings between New York Central and Michigan Central R. R.'s the same as on previous claims.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

R. R.

128 EXHIBIT 35.

Personal. S. A. McM.

DEC. 23, 1904.

Mr. Lowell M. Palmer, 184 Front Street, New York.

DEAR SIR: I hand you herewith New York draft in your favor for $1971.44 in settlement of your claim 37776 covering shipments of sugar consigned to W. H. Edgar & Son, Detroit, Mich.

Kindly sign enclosed receipt and return to me under personal cover.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

Registered mail.

EXHIBIT 36.

Personal. S. A. McM.

NEW YORK, *Jan.* 7, 1905.

Mr. W. F. Wilson, G. M. Fast Freight Lines, Buffalo, New York.

DEAR SIR: Referring to your personal letter of December 19th, I enclose herewith receipt signed by Mr. Lowell M. Palmer for $1971.44 covering your claim N. S. D. 37776.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

EXHIBIT 37.

Personal. P. A. McM.

AUG. 12, 1904.

Mr. T. P. Riley, c/o L. M. Palmer, 184 Front Street, N. Y.

DEAR SIR: I return herewith your claim No. 36690 for
129 $899.01 on shipments of sugar during June consigned to W. H. Edgar & Company, Detroit, via the North Shore Despatch.

I would call your attention to the additional papers, from which you will see that these shipments were billed at 21¢ per 100 lbs., and therefore there is only 3¢ due you instead of 5¢, as per your claim, the agreement being that we will take this sugar from Weehawken to Detroit on the basis of 18¢ per 100 lbs. Will you kindly correct your claim accordingly and return papers to me, and I will have claim put through.

Yours truly,

F. L. POMEROY,
Freight Traffic Manager.

The foregoing case contains all the evidence given upon the trial. And forasmuch as the matters hereinabove set forth do not fully appear of record, and to the end that the same may be and become of record, and in furtherance of justice and that right may be done, the defendant corporation presents and tends this its bill of exceptions herein, and prays that the same may be settled, allowed, signed and certified by the Judge who presided at the trial of this cause, as provided by law; and it is done accordingly at the said October Term this 26th day of February, 1907.

GEORGE C. HOLT,
District Judge of the United States for the Southern District of New York.

No objection is made to the form of the foregoing proposed bill of exceptions, and notice of the settlement thereof is hereby waived. Dated January 30th, 1907.

HENRY L. STIMSON,
United States Attorney.

130 (Endorsed:) U. S. Circuit Court, Southern District of New York.—United States, Plaintiff, against The New York Central & Hudson River Railroad Company, Defendant.—Bill of Exceptions.—Albert H. Harris, Attorney, for Defendant, 417 Grand Central Station, Borough of Manhattan, New York City.—Due service of a copy of the within proposed bill of exceptions and notice of settlement is hereby admitted. N. Y. Jan. 21, 1907. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District New York, Filed Feb. 26, 1907, John A. Shields, Clerk.

131 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and FRED L. POMEROY.

Offering, etc., Rebates (32 Stat. L. 847).

Motion in Arrest of Judgment.

And now, after verdict against the above named defendant corporation, after the denial of its motion for a new trial, and before

sentence, comes the defendant corporation, by Albert H. Harris, its attorney, and moves the court here to arrest judgment herein, and not pronounce the same because of manifest errors in the record appearing, to wit:

1. The indictment herein, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law to warrant this court in passing any sentence upon the said verdict.

2. This defendant is not punishable by the law of the land by reason of any of the matters therein described and set forth.

3. The acts described and set forth therein do not constitute a crime under the laws of the United States.

4. The acts described and set forth in the second count of the indictment do not constitute a crime under the laws of the United States.

5. The acts described and set forth in the third count thereof do not constitute a crime under the laws of the United States.

6. The acts described and set forth in the fourth count thereof do not constitute a crime under the laws of the United States.

132 7. The acts described and set forth in the fifth count thereof do not constitute a crime under the laws of the United States.

8. The acts described and set forth in the sixth count thereof do not constitute a crime under the laws of the United States.

9. The acts described and set forth in the seventh count thereof do not constitute a crime under the laws of the United States.

10. The second count of the said indictment does not sufficiently aver the time, place, nature and circumstances of the offense therein sought to be charged.

11. The third, fourth, fifth, sixth and seventh counts of the said indictment are each of them similarly deficient and defective in respect to averments of the time, place, nature and circumstances of the offense therein sought to be charged.

12. The indictment is bad for the misjoinder, as defendants, of this defendant corporation with the defendants Nathan Guilford and Fred L. Pomeroy, for the doing or omission of the same alleged acts or omissions.

13. The act or omissions, or acts or omissions charged in the indictment are of such a character that this defendant corporation and the other defendants therein named could not, in law, be guilty of a joint offense by reason of the matters therein described and set forth.

14. The offense or offenses charged in the indictment do not wholly arise from the joint action of this defendant corporation and the other defendants therein named.

15. The indictment is so ambiguous and uncertain as to make it doubtful what is the exact offense intended to be charged, and is, for that reason, incapable of sustaining the verdict, or of supporting any judgment.

133 16. The absence of any allegation that some advantage was given or discrimination was practiced by reason of the matters set forth therein, renders the indictment invalid.

17. The indictment cannot be regarded as a valid indictment for a wilful failure strictly to observe the published tariff rates since it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, this defendant corporation wilfully failed strictly to observe the published tariff rates.

18. The indictment fails to charge any violation of the provision of the statute relative to the observance of tariff rates, in that it nowhere alleges any wilful failure strictly to observe them.

19. The statute on which the indictment is based was enacted in excess of the power to regulate commerce with foreign nations and among the several states and with the Indian tribes conferred upon the Congress by section 8 of Article I of the Constitution of the United States, and is unconstitutional and void in that it undertakes to impose and prescribe unreasonable, unequal and unjust regulations of interstate commerce, that is to say, it subjects carriers engaged in interstate commerce by means of the transportation of property from places in one state to places in another state by railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations, restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of the transportation of the same kind of property between the same places, by means wholly by water lines or routes wholly by water.

134 20. The said statute is an unreasonable, unjust and unequal regulation of interstate commerce, and is unconstitutional and void in so far as it undertakes to punish this defendant for acts done by its agents while acting within the scope of their employment, which if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with the defendant corporation by means of an all-water line or route, would be entirely innocent.

21. The said statute is unconstitutional and void in that it seeks to deprive this defendant corporation of its property without due process of law in violation of Article V of the amendments to the Constitution of the United States, by subjecting it to the payment of a pecuniary fine, for acts committed by its agents within the scope of their employment, in which this defendant did not in any manner participate, thus imputing to the said corporation, and punishing it criminally for acts which it did not in fact commit.

22. The provision of section 1 of the said statute, that in construing and enforcing its provisions, the act of any agent employed by a carrier corporation, acting within the scope of his employment shall in every case be also deemed to be the act of such carrier, upon which provision the validity of this indictment wholly rests, so far as it relates to the defendant corporation, infringes the rights, privileges and immunities of this defendant corporation under Article V of the Amendments to the Constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, and thus depriving it of prop-

erty without due process of law; and the said provision is therefore unconstitutional and void.

135 23. The Congress is without power, under the Constitution of the United States, to impute to this corporation the commission of a criminal offense and subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

24. The verdict of the jury is irregular and void in that it finds this defendant guilty of six separate offenses, whereas the matters set forth and described in the indictment constitute but one offense.

And because no judgment can be lawfully rendered against this defendant on said record.

October 19, 1906.

ALBERT H. HARRIS,
Attorney for the Defendant.

(Endorsed:) U. S. Circuit Court, Southern District New York, Filed Oct. 19, 1906, John A. Shields, Clerk.

136 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, NATHAN GUILFORD, and FRED L. POMEROY.

Assignment of Errors.

Now comes the above named defendant, The New York Central and Hudson River Railroad Company, by Albert H. Harris, its attorney, and in connection with its petition for a writ of error herein makes and files the following assignment of errors.

The court erred:

1. In holding that the Congress has power under the Constitution of the United States to impute to this defendant the commission of a criminal offense and to subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

2. In holding that the Act of Congress of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" on which the indictment herein was based is not unconstitutional and void, and was not enacted in excess of the power conferred upon the Congress by the com-

137 merce clause of the Constitution of the United States.

3. In holding that the said Act by subjecting carriers engaged in interstate commerce by means of railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations, restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in such interstate commerce

in competition with such railway, or part railway and part water lines or routes, by means of all-water lines of route-, does not undertake to impose and prescribe unequal and unjust regulations of interstate commerce, and is not for that reason unconstitutional and void.

4. In holding that the said Act is not an unreasonable, unjust and unequal regulation of interstate commerce, and is not unconstitutional and void in so far as it undertook to punish this defendant for acts done by its agents, while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with this defendant by means of an all-water line or route, would not be the subject of prosecution under the Act.

5. In holding that section 1 of the said Act which declares that in construing and enforcing its provisions the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of
138 such carrier does not infringe the rights, privileges and immunities of this defendant under the Fifth Amendment to the Constitution of the United States by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, thus depriving it of property without due process of law, and that the said section is not for that reason unconstitutional and void.

6. In holding that the said Act of February 19, 1903, is not unconstitutional and void in so far as it seeks to punish the defendant's agent Fred L. Pomeroy criminally, for an individual act or acts on his part, committed by him within the scope of his employment by the defendant and at the same time seeks to impute to the defendant and punish it for the same act or acts and thus impose a double punishment for the same act or acts.

7. In holding that the said Act of February 19, 1903, is not unconstitutional and void, notwithstanding that it undertakes to make corporations punishable by fine for the acts of their agents in which such corporations are incapable in law of participating; and that the said act does not thereby undertake to subject the innocent stockholders of such corporations, who take no part in such acts, to punishment without due process of law.

8. In holding that the Act of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and among the States" permits the joinder of defendants in the manner
139 attempted in this indictment.

9. In holding that the said Act of February, 1903, if construed so as to permit the joinder of defendants in the manner attempted in this indictment, is not unconstitutional and void, in that it thereby undertakes to impute to corporations and punish them, as well as their agents, for acts in which the corporation does not, and cannot, participate, or take any part, except by a legal fiction.

10. In holding that the acts described and set forth in the second

count of the indictment constitute a crime under the laws of the United States.

11. In holding that the acts described and set forth in the third count thereof constitute a crime under the laws of the United States.

12. In holding that the acts described and set forth in the fourth count thereof constitute a crime under the laws of the United States.

13. In holding that the acts described and set forth in the fifth count thereof constitute a crime under the laws of the United States.

14. In holding that the acts described and set forth in the sixth count thereof constitute a crime under the laws of the United States.

15. In holding that the acts described and set forth in the seventh count thereof constitutute a crime under the laws of the United States.

140 16. In holding that the second count of the indictment avers the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to have afforded the defendant full notice of the charge and to have enabled it to make its defense with reasonable knowledge and ability.

17. In holding that the third count of the indictment avers the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to have afforded the defendant full notice of the charge, and to have enabled it to make its defense with reasonable knowledge and ability.

18. In holding that the fourth count of the indictment avers the time, place, nature and circumstance of the offense herein sought to be charged with such clearness and certainty as to have afforded the defendant full notice of the charge and to have enabled it to make its defense with reasonable knowledge and ability.

19. In holding that the fifth count of the indictment avers the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to have afforded the defendant full notice of the charge, and to have enabled it to make its defense with reasonable knowledge and ability.

20. In holding that the sixth count of the indictment avers the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to have

141 afforded the defendant full notice of the charge, and to have enabled it to make its defense with reasonable knowledge and ability.

21. In holding that the seventh count of the indictment avers the time, place, nature and circumstance of the offense therein sought to be charged with such clearness and certainty as to have afforded the defendant full notice of the charge, and to have enabled it to make its defense with reasonable knowledge and ability.

22. In holding that the indictment is not bad for the misjoinder, as defendants, of this defendant and the said Nathan Guilford and Fred L. Pomeroy.

23. In holding that the act or omission or acts or omissions charged in the second count of the indictment are of such a character that this defendant and the said Guilford and Pomeroy could,

in law, be guilty of a joint offense by reason of the matters therein specified.

24. In holding that the act or omission or acts or omissions charged in the third count of the indictment are of such a character that this defendant and the said Guilford and Pomeroy could, in law, be guilty of a joint offence by reason of the matters therein specified.

25. In holding that the act or omission or acts or omissions charged in the fourth count of the indictment are of such a character that this defendant and the said Guilford and Pomeroy could, in law, be guilty of a joint offense by reason of the matters therein specified.

142 26. In holding that the act or omission or acts or omissions charged in the fifth count of the indictment are of such a character that the defendant and the said Guilford and Pomeroy could, in law, be guilty of a joint offense by reason of the matters therein specified.

27. In holding that the act or omission or acts or omissions charged in the sixth count of the indictment are of such a character that this defendant and the said Guilford and Pomeroy could, in law, be guilty of a joint offense by reason of the matters therein specified.

28. In holding that the act or omission or acts or omissions charged in the seventh count of the indictment are of such a character that this defendant and the said Guilford and Pomeroy could, in law, be guilty of a joint offense by reason of the matters therein specified.

29. In holding that the offense or offenses charged in the second count of the indictment could wholly arise from the joint action of the several defendants.

30. In holding that the offense or offenses charged in the third count of the indictment could wholly arise from the joint action of the several defendants.

31. In holding that the offense or offenses charged in the fourth count of the indictment could wholly arise from the joint action of the several defendants.

32. In holding that the offense or offenses charged in the fifth count of the indictment could wholly arise from the joint action of the several defendants.

33. In holding that the offense or offenses charged in the sixth count of the indictment could wholly arise from the joint
143 action of the several defendants.

34. In holding that the offense or offenses charged in the seventh count of the indictment could wholly arise from the joint action of the several defendants.

35. In holding that the second count of the indictment is not so ambiguous and uncertain as to make it doubtful what is the exact offense therein intended to be charged.

36. In holding that the third count of the indictment is not so ambiguous and uncertain as to make it doubtful what is the exact offense therein intended to be charged.

37. In holding that the fourth count of the indictment is not so ambiguous and uncertain as to make it doubtful what is the exact offense therein intended to be charged.

38. In holding that the fifth count of the indictment is not so ambiguous and uncertain as to make it doubtful what is the exact offense therein intended to be charged.

39. In holding that the sixth count of the indictment is not so ambiguous and uncertain as to make it doubtful what is the exact offense therein intended to be charged.

40. In holding that the seventh count of the indictment is not so ambiguous and uncertain as to make it doubtful what is the exact offense therein intended to be charged.

41. In holding that the absence of any allegation that
144 some advantage was given or discrimination was practiced by reason of the matters set forth in the second count does not render that count invalid.

42. In holding that the absence of any allegation that some advantage was given or discrimination was practiced by reason of the matters set forth in the third count does not render that count invalid.

43. In holding that the absence of any allegation that some advantage was given or discrimination was practiced by reason of the matters set fourth in the fourth count does not render that count invalid.

44. In holding that the absence of any allegation that some advantage was given or discrimination was practiced by reason of the matters set forth in the fifth count does not render that count invalid.

45. In holding that the absence of any allegation that some advantage was given or discrimination was practiced by reason of the matters set forth in the sixth count does not render that count invalid.

46. In holding that the absence of any allegation that some advantage was given or discrimination was practiced by reason of the matters set forth in he seventh count does not render that count invalid.

47. In holding that the second count adequately charges a wilful failure strictly to observe the published tariff rates although it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, the defendant wil-
145 fully failed strictly to observe the published tariff rates.

48. In holding that the third count adequately charges a wilful failure strictly to observe the published tariff rates although it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, the defendant wilfully failed strictly to observe the published tariff rates.

49. In holding that the fourth count adequately charges a wilful failure strictly to observe the published tariff rates although it nowhere alleges with precision or certainty, at what particular time,

or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, the defendant wilfully failed strictly to observe the published tariff rates.

50. In holding that the fifth count adequately charges a wilful failure strictly to observe the published tariff rates although it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, the defendant wilfully failed strictly to observe the published tariff rates.

51. In holding that the sixth count adequately charges a wilful failure strictly to observe the published tariff rates although it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, the defendant wil-
146 fully failed strictly to observe the published tariff rates.

52. In holding that the seventh count adequately charges a wilful failure strictly to observe the published tariff rates although it nowhere alleges, with precision or certainty, at what particular time, or at what particular places within the jurisdiction of this court, or in what manner, or by what act or acts, the defendant wilfully failed strictly to observe the published tariff rates.

53. In holding that the second count charges a violation of the provision of the Act of February 19, 1903, relative to the observance of tariff rates, notwithstanding that it does not allege any wilful failure on the part of the defendant strictly to observe such rates.

54. In holding that the third count charges a violation of the provision of the Act of February 19, 1903, relative to the observance of tariff rates, notwithstanding that it does not allege any wilful failure on the part of the defendant strictly to observe such rates.

55. In holding that the fourth count charges a violation of the provision of the Act of February 19, 1903, relative to the observance of tariff rates, notwithstanding that it does not allege any wilful failure on the part of the defendant strictly to observe such rates.

56. In holding that the fifth count charges a violation of the provision of the Act of February 19, 1903, relative to the observance of tariff rates, notwithstanding that it does not allege any wilful failure on the part of the defendant strictly to observe such rates.

57. In holding that the sixth court charges a violation of
147 the provision of the Act of February 19, 1903, relative to the observance of tariff rates, notwithstanding that it does not allege any wilful failure on the part of the defendant strictly to observe rates.

58. In holding that the seventh count charges a violation of the provision of the Act of February 19, 1903, relative to the observance of tariff rates, notwithstanding that it does not allege any wilful failure on the part of the defendant strictly to observe such rates.

59. In denying the defendant's motion made before the introduction of any evidence that the jury be instructed to acquit the defendant because of the misjoinder of defendants in the indictment, and for all the reasons set forth in the motion to quash.

60. In denying the defendant's motion that the United States At-

torney be required to elect whether the trial should proceed upon the theory that the indictment charged the giving of unlawful rebates or upon the theory that it charged a wilful failure strictly to observe the published tariff rates.

61. In refusing to instruct the jury at the close of the case that the defendant must be acquitted because of its misjoinder with the individual defendants in the indictment, it appearing from the evidence that the act or omission or acts, or omissions charged therein were of such a character that the corporation and its agents could not, in law, be guilty of a joint offense in doing what is therein set forth.

62. In refusing to instruct the jury at the close of the evidence to acquit the defendant because of the insufficiency of the
148 indictment.

63. In refusing to instruct the jury at the close of the evidence to acquit the defendant because the facts proven by the Government did not establish the commission of any crime by the defendant.

64. In denying the defendant's motion made at the close of the case that the United States Attorney be required to elect whether the case should go to the jury on the theory that the indictment charged the giving of rebates, or on the theory that it charged a wilful failure strictly to observe the published tariff rates.

65. In charging the jury as follows:

"I charge you that under this Act, the payment of each rebate constitutes a distinct offense and that you may find by your verdict whether all or any of these offenses were committed by both or by either of these defendants."

66. In charging the jury as follows:

"You may find that they are guilty in respect to all six of these offenses, or that one is and that the other is not, and you may find that either of them is guilty in respect to any one of these shipments, if you can draw any distinction between them, and not guilty in respect to any other. The whole question is before you for determination."

67. In charging the jury as follows:

"Now, Gentlemen, upon this evidence it is for you to say whether these defendants or either of them are guilty of these six offenses or either of them."

68. In charging the jury on the question of the criminal intent of this defendant corporation as follows:

"You may take into consideration upon that question the evidence in this case that the original claims presented by Palmer to Pomeroy and sent by Pomeroy to Wilson have been destroyed, and the fact that when Embleton, the man in charge of these shipments
149 left the employment there a book containing entries in reference to these claims disappeared, and that Mr. Wilson testified in this case that he did not know where it was."

69. In further charging the jury on the same subject as follows:

"There are cases however in which intent may be inferred from the act itself, and it will be a question for you in this case whether

intent is not inferable from the agreement contained in this letter of April 26th in which Mr. Pomeroy says: 'This is to advise that taking effect immediately we will undertake to handle Edgar's shipments for Detroit and such shipments as are to be reforwarded from there to points on the Michigan Central Railroad, at a rate of 18 cents per 100 pounds New York to Detroit, all-rail, shipments to be billed at the tariff rates and refund made by voucher.' "

70. In further charging the jury on the same subject as follows:

"On this question of intent also, Gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guilford was headed private and confidential. This letter from Pomeroy to Palmer is headed 'private and confidential." It will be proper for you to take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct check drawn at Buffalo by or on behalf of
150 this defendant, was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical Bank in favor of Mr. Palmer."

71. In charging the jury as follows:

"Now it is for you to say, Gentlemen, whether these occurrences and these facts are consistent with innocence or with guilt, because if a man carries on an act, or any person does anything which upon its face is apparently unlawful, and he does it in a furtive and secret manner showing that his intention while he does the act is to do it in such a way as to conceal it, the jury may draw the inference from that fact, if they see fit—they are not obliged to, but they may if they see fit—that the intention with which the act was done was to perform an illegal or a criminal act."

72. In charging the jury as follows:

"And indeed, Gentlemen, you may draw such an inference if you see fit from the general nature of a rebate."

73. In charging the jury as follows:

"If this was an honest transaction and there was a just reason why this railroad company should charge the American Sugar Company 18 cents a 100 instead of 23 cents per 100 on their shipments to Edgar, why did not they take checks in payment for the 18 cents a 100? What is the inference to be drawn when men carry on the business in this way of paying the full tariff rate and then
151 months afterwards paying back a rebate for the simple purpose of accomplishing what they might have accomplished by sending a check in the first place for the difference? It is for you to say."

74. In refusing to instruct the jury as follows:

"That upon all the evidence it is the duty of the jury to render a verdict of not guilty."

75. In refusing to instruct the jury as follows:

"That if the jury find as a fact that the evidence shows no more than this, that rebates on sugar carried by this defendant were given by the two defendants Guilford and Pomeroy without the knowledge of this defendant's president, or executive officers, or directors or any officer beyond the two defendants Guilford and Pomeroy, then the

defendant the New York Central & Hudson River Railroad Company should be acquitted."

76. In refusing to instruct the jury as follows:

"That the jury must not guess or conjecture, but the Government is bound to prove beyond a reasonable doubt not only that the defendants Guilford and Pomeroy gave rebates, but also that the giving of such rebates was in fact authorized by those who controlled the corporate action of the defendant corporation."

77. In refusing to instruct the jury as follows:

"That in order to prove that this defendant corporation authorized the giving of rebates it is not enough for the Govern-
152 ment to prove merely the giving thereof by Guilford and Pomeroy together with the fact that thereafter certain claims were presented and paid out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo."

78. In refusing to instruct the jury as follows:

"That even if the jury find as a fact that rebates were given by the defendants Guilford and Pomeroy, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except the defendant Guilford, then this defendant corporation must be acquitted."

79. In refusing to instruct the jury as follows:

"That the burden of proof is not upon this defendant corporation to show affirmatively that no advantage was given in favor of or discrimination practiced against any shipper or consignee other than those named in the indictment, but the burden of proof was upon the Government to show that fact, if it were true."

80. In refusing to instruct the jury as follows:

"That the jury must not speculate, or guess on the question whether any advantage was given to or discrimination practiced against any shipper or consignee other than those named in the indictment and if the jury find as a fact that there is no evidence one way or the other on that question, then this defendant corporation must be acquitted."

81. In refusing to instruct the jury as follows:

"That the Government having failed to prove that any advantage was given to the firm of W. H. Edgar & Son or the American Sugar Refining Companies mentioned in the indictment, or dis-
153 crimination was practiced in their favor or against any other shipper or consignee by reason of the giving of the alleged rebates, this defendant corporation must be acquitted."

82. In refusing to instruct the jury as follows:

"That before the jury can find this defendant guilty of giving unlawful rebates, they must find as a fact from the evidence and find beyond a reasonable doubt that in the giving of the alleged rebates this defendant corporation did thereby give some advantage to the firm of Edgar & Son or the American Sugar Refining Companies mentioned in the indictment or practised some discrimination in their favor or against some other shipper or consignee."

83. In refusing to instruct the jury as follows:

"That the element of advantage or discrimination is an essential element of the crime of giving rebates and as the indictment omits to allege this element it fails to charge a crime and this defendant corporation must be acquitted."

84. In refusing to instruct the jury as follows:

"That even if the jury find a criminal intent in the defendant Pomeroy the jury cannot impute that intent to the defendant corporation."

85. In refusing to instruct the jury as follows:

"That the jury cannot make a finding of criminal intent against the defendant corporation and base that finding solely on a finding of criminal intent against the defendant Pomeroy."

86. In refusing to instruct the jury as follows:

"That the defendant corporation can in no event be convicted of a criminal intent to commit the crime of giving rebates."

154 87. In refusing to instruct the jury as follows:

"That the defendant corporation cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity by direction of those controlling its corporate action it did or authorized the acts charged in the indictment, and as there is no proof thereof, it must be acquitted."

88. In refusing to instruct the jury as follows:

"That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant corporation authorized or knew of the giving of any unlawful rebates by Guilford and Pomeroy, then the defendant corporation must be acquitted."

89. In refusing to instruct the jury as follows:

"That the defendant cannot be found guilty unless the evidence shows that sugar was carried for other shippers over the route named in the indictment on terms different from those given to the American Sugar Refining Company or Edgar."

90. In refusing to instruct the jury as follows:

"That the jury cannot find the defendant corporation guilty upon a finding that the corporation after the fact, ratified or approved of the giving of alleged rebates.

91. In refusing to instruct the jury as follows:

"That even if the jury find as a fact that the defendants Guilford and Pomeroy gave rebates as alleged in the indictment and that thereafter such rebates were paid by or through other agents of the defendant corporation in Buffalo, still those facts are not sufficient to warrant a verdict of guilty against the defendant."

155 92. In refusing to instruct the jury as follows:

"That there is no evidence that those who controlled the corporation authorized or knew of the giving of the rebates alleged in the indictment."

93. In refusing to instruct the jury as follows:

"The provision of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier cor-

poration shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

94. In refusing to instruct the jury as follows:

"That there is no presumption that any other shipper was refused the same rate that was given to the firm of Edgar & Son or the Sugar Refineries mentioned in the indictment."

95. In refusing to instruct the jury as follows:

"That if the jury find that the essential nature of the rebates alleged to have been given was deceit and secrecy and that as a matter of fact the giving thereof was kept secret from those who controlled the corporate action of the defendant corporation then that defendant must be acquitted."

96. In refusing to instruct the jury as follows:

156 "That in order to find that the defendant Pomeroy or Guilford was acting within the scope of his employment the jury must find as a fact beyond a reasonable doubt not merely that such agent had authority to establish lawful rates, but must find also that such agent had authority to make the unlawful rates alleged in the indictments."

97. In refusing to instruct the jury as follows:

"Criminal intent on the part of the corporation cannot be inferred solely and merely from the fact that a rebate was given as charged in the indictment, if the jury find that such rebate was given."

98. In holding that the verdict of the jury was regular and valid.

99. In rendering judgment upon the said verdict.

100. In imposing cumulative sentences.

101. In sentencing the defendant to the payment of more than a single fine.

Wherefore the defendant prays that the judgment herein be reversed, annulled and held for naught, and that the defendant be wholly discharged and dismissed from the premises in the indictment specified.

Dated the 2nd day of March, 1907.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By ALBERT H. HARRIS, *Attorney.*

Read the 2nd day of March, 1907.

E. HENRY LACOMBE,
United States Circuit Judge.

157 (Endorsed:) Circuit Court of the United States, Southern District of New York.—The United States of America against The New York Central and Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy. Assignment of errors.—Albert H. Harris, Attorney for plaintiff-in-error.—U. S. Circuit Court, Southern District New York, Filed Mar. 2, 1907, John A. Shields, Clerk.

158 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Supersedeas Bond.

Know all men by these presents, that we, The New York Central and Hudson River Railroad Company, a corporation organized and existing under the laws of the State of New York, as principal, and National Surety Company a New York corporation as surety, are held and firmly bound unto the United States of America in the sum of one hundred and eight thousand dollars, to be paid to the said United States, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 28th day of February, in the year of our Lord one thousand nine hundred and seven.

Whereas on the 19th day of October, 1906, in a cause pending in this court between the United States of America and the said The New York Central and Hudson River Railroad Company (impleaded with Nathan Guilford and Fred L. Pomeroy), a judgment and sentence were rendered against the said The New York Central and Hudson River Railroad Company; and

159 Whereas the said The New York Central and Hudson River Railroad Company has prayed and been allowed a writ of error from the Supreme Court of the United States to this court to reverse the said judgment and sentence;

Now, the condition of this obligation is such, that if the said The New York Central and Hudson River Railroad Company shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its plea good, and shall appear in the said Supreme Court on the 30 day of March, 1907, and from day to day thereafter until the said cause shall be finally disposed of, and shall abide by and obey the judgment and order made by the said Supreme Court in said cause, and shall pay the said judgment against it, if the same shall be affirmed, and if it shall appear for trial in this court on such day as may be appointed for a retrial and abide by and obey all orders of this court, provided the said judgment and sentence against it shall be reversed by the said Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, *President.*
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON, *Res. Vice-President.*

Attest:
[SEAL.] HARRY E. EMMETT,
Res. Asst. Secretary.

Sealed and delivered, and taken and acknowledged, this 2nd day of March, 1907, before me.

E. MORTIMER BOYLE, [SEAL.]
Notary Public, New York County.

160 STATE OF NEW YORK, *County of New York, ss:*

On this 2nd day of March, 1907, before me personally appeared Wm. A. Thompson, Res. Vice President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice President of said Company by like authority, and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Wm. A. Thompson further said that he is acquainted with Harry E. Emmett and knows him to be the Res. Asst. Secretary of said Company; that the signature of the said Harry E. Emmett subscribed to the said instrument is in the genuine handwriting of the said Harry E. Emmett and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Res. Vice President.

E. MORTIMER BOYLE,
Notary Public, New York County.

Copy of By-Law.

Be it remembered, that at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the first day of May, 1906, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1. Signatures Required. All bonds, recog-
161 nizances, contracts of indemnity, policies of insurance and all other writings obligatory in the nature thereof, shall be signed by the President, the Vice President, Second Vice President, Third Vice President, or Fourth Vice President, a Resident Vice-President, or Attorney-in-fact, and except when signed by an Attorney-in-fact, shall have the seal of the Company affixed thereto duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. The Vice-President, second Vice-President, Third Vice President, Fourth Vice President and Resident Vice President shall each have authority to sign such instruments, whether the President be absent, or incapacitated or not; and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments whether the Secretary be absent, or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President, and duly sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Harry E. Emmett, Res. Asst. Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company in the County of New York, this 28th day of February, 1907.

HARRY E. EMMETT,
Res. Asst. Secretary.

[SEAL.]

162 F. 399:

Financial Exhibit of the National Surety Company of New York as of December 31st, 1906.

Wm. B. Joyce, President. Samuel H. Shriver, Secretary.

Assets.

Bonds:						
275,500 United States Government Bonds					$294,115.00	
940,000 New York City Bonds					930,600.00	
10,000 Penna. Railroad Bonds					9,600.00	
Guaranteed Railroad Stocks:						
100 Shs. N. Y. Lack. & W.	(5%	Guar.	by	D. L. & W.)	12,925.00	
100 " Nash. & Decatur	(7½%	"	"	L & N.)	19,375.00	
200 " Morris & Essex	(7%	"	"	D. L. & W.)	37,100.00	
100 " Pitts. Ft. W. & Chic.	(7%	"	"	Penn. R. R.)	17,775.00	
100 " Cleve. & Pitts.	(7%	"	"	" ")	17,758.33	
100 " Atl. & Char. Air Line	(7%	"	"	So. Ry.)	18,058.33	
100 " Det. Hillside & S. W.	(4%	"	"	L.S.&Mich. So.)	10,400.00	
100 " Rome, Watert'n & Og.	(5%	"	"	N. Y. Cent.)	12,862.50	
100 " Ill. Cent. (Leased Lines)	(4%	"	"	Ill. Cent.)	10,400.00	
400 " K. C. Ft. S. & Memph	(4%	"	"	St. L. & San Fr.)	32,000.00	
Railroad Stocks:						
200 Shares Union Pac. Preferred					18,500.00	
400 Shares Lehigh Valley.					31,000.00	
						1,472,469.16
Real Estate (Unencumbered)						116,426.77
Mortgage Loans (First Liens)						17,465.85
Advanced on Contracts (Secured)						9,553.65
Accounts due from R. R.'s for inspections, not over three months overdue						5,727.61
Outstanding Premiums, not over three months overdue						179,719.15
Accrued Interest on Investments						8,196.15
Cash in Banks and Offices						294,553.67
						$2,104,112.01

Liabilities.

Capital Stock	$500,000.00
Net Surplus	620,565.61
Quarterly Dividend payable Jan'y 2, 1907	10,000.00
Reserve for Claims in process of adjustment, less reinsurance	115,978.01
Legal Premium Reserve	700,097.01
Contingent Reserve	100,000.00
Commission on Unpaid Premiums and Other Liabilities	57,471.38
	$2,104,112.01

STATE OF NEW YORK, *City and County of New York, ss:*

Gilbert Congdon of New York, being duly sworn, deposes and says that he is Assistant Secretary of the National Surety Company, of New York, and that the above and foregoing is a full, true and correct statement of the financial condition of said Company on the Thirty-first day of December, A. D., 1906, as the same remains upon file in the office of the Attorney-General of the United States.

GILBERT CONGDON.

Subscribed in my presence and sworn to before me this 30th day of January, A. D., 1907.

[SEAL.]

P. W. MYERS,
Notary Public, No. 85, for Kings Co.

Certificate filed in New York, Queens and Westchester Counties.

43 WALL STREET,
NEW YORK, *January 23rd*, 1907.

We have examined the books of the National Surety Company, of New York, as of December 31st, 1906, and certify that the foregoing Balance Sheet agrees therewith and, in our opinion, correctly sets forth the condition of the Company's affairs as of that date. We received verification of the Cash in banks and offices; and all Securities covering the Investments and other Assets of the Company were examined by us and found in order.

GUNN, CHARLES & CO.,
Public Accountants.

163 (Endorsed:) Circuit Court of the United States of America, For the Southern District of New York, in the Second Circuit.—The United States of America against The New York Central and Hudson River Railroad Company.—Supersedeas Bond.—Albert H. Harris, Atty. for Plaintiff in Error.—Approved as to form and also as to sufficiency of sureties, with reservation, however to the Deft. in Error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. C. J.—U. S. Circuit Court, Southern District New York, Filed Mar. 2, 1907, John A. Shields, Clerk.

164 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Henry L. Stimson, Esquire, United States Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the Capitol in the City of Washington in the District of Columbia, on the 30th day of March, 1907, pursuant to a writ of error filed in the Clerk's

Office of the Circuit Court of the United States for the Southern District of New York, wherein the New York Central and Hudson River Railroad Company is plaintiff and the United State of America is defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 2 day of March in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

E. HENRY LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

165 [Endorsed:] E. & O. E. 2560. Supreme Court of the United States. The New York Central & Hudson River R. R. Co., Plaintiff in error, *vs.* The United States of America, Defendant in error. Citation. Albert H. Harris, Att'y for Pl'ff in error. U. S. Circuit Court. Filed Mar. 4, 1907. Southern District, New York. John A. Shields, Clerk. Service admitted March 4th, 1907. Henry L. Stimson.

166 [Endorsed:] Supreme Court of the United States. New York Central and Hudson River R. R. Co. Pl'ff in Error, *vs.* The United States of America, Def't in Error.

Endorsed on cover: File No. 20,653. S. New York, C. C. U. S. Term no. 274. The New York Central & Hudson River Railroad Company, plaintiff in error, *vs.* The United States. Filed April 4th, 1907. File No. 20,653.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1907.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error,

vs.

THE UNITED STATES.

No. 274.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error,

vs.

THE UNITED STATES.

No. 294.

Motion to Advance.

These cases, and No. 624, are three of the criminal prosecutions known as the New York Central "rebate cases" based upon the Elkins Law (Act of February, 1903, entitled "An Act to further regulate commerce with foreign nations and among the States").

No. 624 is a writ of error taken by and on behalf of the United States, under the authority of the Act of March 2, 1907, entitled "An Act providing for writs of error in certain instances in criminal cases," from the Circuit Court

of the United States for the Southern District of New York, direct to this court, to review a judgment of the Circuit Court entered January 22, 1908, sustaining a demurrer to an indictment, filed against the defendant-in-error (the plaintiff-in-error in Nos. 274 and 294) August 10, 1906.

The Act of March 2, 1907, provides that a writ of error taken thereunder

> "shall be diligently prosecuted and shall have precedence over all other cases."

The Solicitor General having moved that the Court advance No. 624, the plaintiff-in-error herein moves that Nos. 274 and 294 be also advanced and set down for argument immediately after No. 624.

Nos. 274 and 294 are writs of error to review judgments of the Circuit Court entered October 19, 1906, and November 22, 1906, sentencing the plaintiff-in-error to the payment of fines of $108,000 and $18,000, respectively, on convictions for alleged violations of the Elkins Law.

In No. 274 the indictment contains seven counts. The first count charges an alleged offer in April, 1904, to give unlawful rebates and concessions in respect of the transportation of property in interstate commerce, and the remaining six counts charge the subsequent giving, between August and November, 1904, of various sums of money by way of rebate and concession, pursuant to an unlawful agreement entered into for that purpose. The plaintiff-in-error was found guilty as to these six counts, and was sentenced to pay a fine of $18,000 upon each.

In No. 294 the indictment contained two counts, both based upon the same transaction, namely, the giving of a rebate in April, 1903, pursuant to an agreement entered into in November, 1902; and in this case the jury returned a general verdict of guilty.

All of the cases involve the construction and application of the Constitution of the United States. Each case presents important and novel questions of law, some of which are common to all of them. The convenience of the Court and of counsel will be served by assigning the three cases for argument consecutively.

Notice of this motion has been served on the Solicitor General and proof of service filed with the clerk.

AUSTEN G. FOX,
JOHN D. LINDSAY,
Counsel for the New York Central and Hudson River Railroad Company.

April, 1908.

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Supreme Court of the United States.

OCTOBER TERM, 1908.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error, vs. THE UNITED STATES.	No. 57.

Brief and Argument for the Plaintiff in Error.

Statement of the Case.

This is a writ of error to review a judgment of the Circuit Court of the United States for the Southern District of New York, rendered October 19, 1906, on the verdict of a jury finding the plaintiff in error, a New York corporation, and one Fred L. Pomeroy, its Assistant Traffic Manager, "guilty of rebating on all the counts of the indictment from the second down to the seventh, inclusive" (Bill of Exceptions, Record, p. 84*), of an indictment containing seven counts (Record, pp. 3-27), purporting to charge as many joint violations

*The verdict as entered in the minutes of the trial was "guilty on the second, third, fourth, fifth, sixth and seventh counts of indictment" (Record, p. 40).

by the plaintiff in error and two of its agents, namely Pomeroy and Nathan Guilford, its Traffic Manager, of the Act approved February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" (commonly called the Elkins Act), by which judgment the plaintiff in error was sentenced "for each of the six crimes of which it had been convicted, to pay a fine of $18,000, making six fines, amounting in the aggregate to the sum of $108,000" (Bill of Exceptions, Record, p. 85*).

Section 1 of the Elkins Act which, for convenience of reference, we have divided into five clauses, is as follows:

> (1) "That anything done or omitted to be done by a corporation common carrier subject to the Act to Regulate Commerce, and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts, or by this Act, with reference to such persons, except as such penalties are herein changed. (2) The wilful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof, the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for

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*The judgment as entered in the minutes was that the plaintiff in error "pay a fine of eighteen thousand dollars on each of the six counts, making in all the sum of one hundred and eight thousand dollars" (Record, p. 40).

each offense; (3) and it shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to the said Acts to regulate commerce, and the Acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said Acts to Regulate Commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebates, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars, nor more than twenty thousand dollars. (4) In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person. (5) Whenever any carrier files with the Interstate Commerce Commission, or publishes a particular rate under the provisions of the Act to Regulate Commerce, or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

The first count of the indictment, which was one of four filed by the Grand Jury for the South-

ern District of New York, May 4, 1906,* sets forth that at the times therein mentioned the plaintiff in error was engaged in the transportation of passengers, freight and property for hire over a continuous line and route from the city of New York, by way of the Southern District of New York, to Detroit, Michigan, on and by its own railroads and those of connecting common carriers, under a common control, management and arrangement for a continuous carriage and shipment; that the plaintiff in error and its said connecting carriers had jointly established and filed with the Interstate Commerce Commission, as required by law, and had published a joint tariff, by which the rate upon sugar from New York to Detroit was twenty-three cents for each hundred pounds; that the American Sugar Refining Company, a New Jersey corporation, and the American Sugar Refining Company of New York, a New York corporation, were engaged, under a common management, in selling and shipping large quantities of sugars from New York to Detroit over the lines of the various common carriers leading out of the City of New York, including the line and route mentioned, and that the firm of W. H. Edgar & Son, of Detroit, were desir-

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*The indictment in The New York Central and Hudson River Railroad Company, plaintiff in error, *v.* The United States (No. 69), was another of those filed the same day (Record, p. 30). A third indictment charged the plaintiff in error and the defendant Guilford with having on May 14, 1903, paid Palmer pursuant to an agreement made October 15, 1902, a rebate of $920.39 on sugar shipped to Edgar & Son (*Id.*, p. 32). The fourth indictment charged Guilford Pomeroy and two of the members of the firm of Edgar & Son with an alleged conspiracy under Section 5440 of the Revised Statutes by causing and procuring the plaintiff in error to give rebates on sugar shipped by the sugar companies to Edgar & Son (*Id.*, 32, 37). Demurrers were interposed to all of the indictments. The demurrer to the conspiracy indictment was sustained. The others were overruled (*Id.*; The United States *v.* New York Central & Hudson River Railroad Co., 143 Fed. Rep., 298).

ous of purchasing from the sugar companies sugars to be shipped to them from New York (*Id.*, pp. 3-5).

This count then alleges (*Id.*, pp. 4-5) that on the 26th day of April, 1904, at and in the Southern District of New York, the defendants, upon the solicitation of Palmer and Riley, acting for and on behalf of and as agents of the sugar refining companies and Edgar & Son, offered to grant and give a rebate and concession of five cents from the published rate in respect of any sugars which the companies might ship to Edgar, etc.

On the trial the United States Attorney withdrew this count from the consideration of the jury (p. 93).

The remaining six counts charge that on April 24, 1904, Palmer and Riley, as agents of and acting for and on account of the sugar refining companies and Edgar & Son, induced the plaintiff in error

> "and its agents, Nathan Guilford and Fred L. Pomeroy, *acting within the scope of their authority as traffic manager and assistant traffic manager, respectively,* of the said railroad company, to enter into *an unlawful agreement and arrangement* (Second count, Record, pp. 7-8; Sixth count, *Id.*, pp. 23-24)

with Palmer and Riley, under which the sugar refining companies, between that day and October 31, following, delivered to the plaintiff in error for transportation to Edgar & Son upwards of four hundred and eighty-two consignments of sugar which were accordingly so transported; that the regular joint tariff rate (which was twenty-three cents for each hundred pounds at all times except during the month of June, when it was twenty-one cents) was duly paid to the plaintiff in error, according to the agreement; that on *seven* different days between July 24 and November 17, 1904, claims for rebate and concession in respect of sugars transported during specified portions of the period over which the shipments extended, were

presented by Palmer and Riley, as agents, &c., to the plaintiff in error for payment, and that on *six* separate days between August 31 and December 28, 1904, the plaintiff in error and Guilford and Pomeroy, as agents, &c., paid and caused to be paid, to Palmer, as agent of and for the benefit of the sugar refining companies, "by way of rebate and concession in respect of the transportation of said sugars under the said unlawful agreement and arrangement" sums aggregating $8,913.27.

It is averred that by this alleged unlawful agreement and arrangement of April 26, 1904, in entering into which, it will be observed, Guilford and Pomeroy are alleged to have been "acting within the scope of their *authority* as traffic manager and assistant traffic manager respectively" (Record, pp. 7 and 23),

> "it was agreed that in the event of any of said sugars being shipped by the" (sugar refining companies) "to the said W. H. Edgar & Son over the line and route aforesaid . . . and in the event of the said consignors paying and procuring to be paid to the" (plaintiff in error) "as common carrier, the full rates and charges named in said tariff as aforesaid . . . the" (plaintiff in error) "would transport and cause to be transported said sugars" (to Detroit) "and would grant and give a rebate and concession* . . . in respect of the transportation of said sugar" (to Palmer and Riley as the agents of and for the benefit of the sugar refining companies and Edgar & Son, such sum) "to be refunded from the lawful amounts paid as aforesaid . . . And . . . that thereafter, upon any and all shipments and transportations of such sugars" (Palmer and Riley, &c.), "should present claims to and upon the said railroad company for such rebates and concessions,

*Of five cents, according to the second count (Record, p. 7), and of three cents, according to the sixth count (*Id.*, p. 24) for each hundred pounds.

and that the same should be paid by the said railroad company" to Palmer and Riley, as agents, &c., thereby reducing the tariff, &c.

The *second count* alleges that pursuant to the unlawful arrangement described in that count the American Sugar Refining Company of New York delivered to the plaintiff in error for shipment and transportation to Edgar & Son on each of the remaining days of April and on each of eighteen different days between the 2d and 27th of May, shipments of sugars, aggregating eighty-five in all, each shipment being represented by a separate way-bill, and as many as nine different shipments being made on a single day; that the same were transported to Detroit "over the continuous line and route", &c., that the regular joint tariff rate was duly paid to the plaintiff in error, "according and pursuant to said agreement", that on July 14, 1904, a claim for $1,524.99 "for rebate and concession" was presented by Palmer and Riley as agents, &c., to the plaintiff in error for payment, and that on August 31, 1904, the plaintiff in error, and Guilford and Pomeroy, "as agents and acting on behalf of said company within the scope of their employment", paid and caused to be paid the said sum to Palmer, as agent, &c., "by way of rebate and concession", &c. (Record, pp. 8-10).

The *third count* (omitting the technical averments) alleges that pursuant to the same arrangement the two sugar refining companies delivered to the plaintiff in error during the months of July and August, 1904, one hundred and twenty-two different shipments of sugars (eleven of which were made on August 30th) which were transported to Detroit, and on which the regular tariff rate was paid; that on August 24, 1904, claims for $1,192.16 and $1,282.38, respectively, were presented, and that on October 29, 1904, the three defendants paid the aggregate amount of these two claims, viz.:

$2,474.54, and caused the same to be paid, to Palmer, as agent, &c. (*Id.*, pp. 11-15).

The *fourth count* alleges the delivery by the sugar refining companies to the plaintiff in error and transportation by the latter, pursuant to the same arrangement, of one hundred and ten consignments during the month of September, 1904 (nineteen of them being made on September 10th alone), the presentation of a claim for $2,117.19 on October 20th, and the payment of that sum on November 23, 1904, by way of rebate, &c. (*Id.*, pp. 15-18).

The *fifth count* alleges the transportation, pursuant to the same arrangement, of one hundred and eighteen shipments for the sugar refining companies during the month of October (sixteen of which were made on the 8th of that month), the presentation of a claim for $1,971.44 on November 17, 1904, and the payment of that sum by way of rebate, &c., on December 28, 1904 (*Id.*, pp. 18-22).

The *sixth count* alleges the transportation, pursuant to the arrangement described in that count, of forty-seven shipments for the sugar refining companies during the month of June, 1904 (when the tariff rate was twenty-one, instead of twenty-three, cents), the presentation of a claim for $539.40 on August 15, 1904, and the payment of that sum by way of rebate on September 14, 1904 (*Id.*, pp. 22-26).

The *seventh count* alleges the delivery to the plaintiff in error by both sugar refining companies, pursuant to the arrangement described in the second count, "from time to time during the months of April and May", 1904, of "divers and various consignment of sugars" for transportation to Detroit, and which were so transported, the presentation of a claim for $285.71 on July 14, 1904, and the payment of that sum by way of rebate, &c., on September 20, 1904 (*Id.*, pp. 26-27).

The plaintiff in error demurred to the indictment.

The demurrer, after presenting the general objection, in the common law form, that the indictment and the matters therein contained, &c., were "not sufficient in law" and that the plaintiff in error was "not bound by the law of the land to answer the same", assigned as specific and special causes of demurrer, that the acts described and set forth did not constitute a crime under the laws of the United States, and that the second, third, fourth, fifth, sixth and seventh counts did not aver the time, place, nature and circumstances of the offense therein sought to be charged with such clearness and certainty as to afford the plaintiff in error full notice of the charge, and enable it to make its defense with reasonable knowledge and ability (Record, pp. 28-29).

It appears by the written opinion of the learned District Judge who overruled the demurrer (pp. 30-37) that the particular objections considered by him were (*a*) that it is an essential element of the offense of giving rebates, as defined by the Elkins Act, that some advantage should have been thereby given or discrimination have been thereby practiced, that the omission to allege directly this essential element could not be supplied by intendment or implication, and that the result of such omission was to render the indictment invalid; (*b*) that the indictment could not be treated as charging a violation of the second clause of the Act since it did not allege any *wilful* failure by the plaintiff in error to observe the published tariff, and (*c*) that the defendants Guilford and Pomeroy were improperly joined as defendants with the plaintiff in error (Record, p. 32).

(*a*) As to the first of these objections the learned judge, after observing that reliance was put on the case of *United States* v. *Hanley*, 71 Fed. Rep., 672, said:

> "If it were necessary to base the decision of this demurrer upon this point, I should

hesitate to follow the decision in *United States* v. *Hanley*. I think that if a railroad company receives from a shipper the full schedule rate, and then repays him a percentage of the amount paid as rebate, there is weighty ground to hold that it is presumptively guilty of illegal discrimination under the act, and that if in fact the railroad company had pursued the extremely unlikely course of making an uniform reduction of its rates to everybody while retaining a higher rate on its published schedules *no substantial injustice will be done any defendant if he is left to prove that fact as part of his defense.* But without passing definitely upon this question it is sufficient to say that the case of *United States* v. *Hanley* also held that the payment of a rebate from the schedule rates violated *the provisions of the act prohibiting deviations from the published rates. The allegations of this indictment certainly support that charge sufficiently*" (*Id.*, pp. 31-32).

(*b*) As to the objection that there was no allegation of a *wilful* failure strictly to observe the published rate he said:

> "The fact that the indictment alleges that the full schedule rate was first paid to the railroad company and that thereafter $920.39 was paid by the defendants to Palmer as agent for the shippers 'by way of rebate and concession in respect of the transportation of said sugars under said unlawful agreement' is in my opinion a *sufficient allegation that payment was a wilful failure to observe the published tariff*" (*Id.*, p. 32).

(*c*) Of the objection of misjoinder he said that "as the Interstate Commerce Act, as amended, and the Elkins Act provide that the corporation and its agents may be criminally liable for *giving rebates* I do not see why these defendants cannot be prosecuted for the same offense in one indictment" (*Id.*, p. 35).

The opinion did not otherwise discuss the objection that the indictment was fatally defective for want of clearness and certainty as to the nature and circumstances of the offense sought to be charged,

The defendant Guilford's motion for a severance was granted, and the trial proceeded as to the plaintiff in error and the defendant Pomeroy only (*Id.*, p. 41).

Before the jury was empanelled the plaintiff-in-error moved for an order quashing and dismissing the indictment upon various grounds and among others, *a*, those presented by the demurrer (*Id.*, pp. 41-42 [1-11]); *b*, that the Elkins Act, if so construed as to permit the joinder of defendants in the manner attempted in the indictment was unconstitutional and void in that it thereby undertook to impute to corporations and punish them, as well as their agents, for acts in which the corporation did not and could not participate or take any part except by a legal fiction (*Id.* [14]) and *c*, that the Act was unconstitutional and void in that it undertook to make corporations punishable for the acts of its agents in which they were incapable in law of participating and thereby undertook to subject the innocent stockholders of such corporations, who took no part in such acts to punishment without due process of law (*Id.* [13]). The motion being denied the plaintiff-in-error, after the jury was empanelled and sworn, moved that they be directed to render a verdict of acquittal "on the ground of misjoinder, and for each of the other reasons set forth in the motion to quash or dismiss." This motion was also denied (*Id.*, p. 44).

The evidence introduced on the trial consisted principally of agreed statements of fact, admissions on the part of the defendants (*Id.*, p. 44-52, 54, 60, 61, 62, 63, 68, 78, 80, 82, 92) and correspondence

produced by the defendant Pomeroy pursuant to the United States Attorney's notice to produce (*Id.*, pp. 55-56, 59, 63, 67-68) amplified by oral and documentary evidence establishing the following facts:

The plaintiff-in-error operates lines extending from the City of New York to the cities of Buffalo and Niagara Falls (*Id.*, p. 45).

During the period covered by the indictment W. H. Newman was the president of the company and E. L. Rossiter was the treasurer. There were five or six vice-presidents, and a board of directors consisting of about twelve members which met from time to time (*Id.*, p. 68). The president had general power to appoint such officers and assistants as he might require, who should perform such duties as from time to time might be assigned to them by him (*Id.*, pp. 49-50).

The defendant Nathan Guilford was appointed General Traffic Manager of the company September 28, 1887, and continued in that position until May 11, 1898, when he was appointed General Freight Traffic Manager, with general supervision of all traffic matters. He held the latter position and performed its duties at the time of the trial and until February 1, 1905, when he was appointed Vice-President, in charge of such matters (*Id.*, pp. 49-51).

The defendant Fred L. Pomeroy, was Assistant Traffic Manager from February 1, 1901, until June 30, 1904, when he was appointed Freight Traffic Manager, which position he occupied at the time of the trial (p. 50).

During the period covered by the indictment Messrs. Guilford and Pomeroy had general charge of the freight traffic over the Company's lines (p. 46), and

> "were authorized to establish rates at which freight should be carried over the line of The New York Central & Hudson River Railroad Company, and to unite with other

companies in the establishment, filing and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment" (p. 50).

The freight department had agents of different rank and different authority in large numbers throughout the state, engaged in handling the company's traffic which was of very great volume and involved the making of a very large number of contracts and the carriage of a great many different kinds of freight (p. 68).

At the times mentioned in the indictment the plaintiff-in-error and the Michigan Central Railroad Company, a Michigan corporation operating a line connecting with that of the plaintiff-in-error at Niagara Falls and extending from that place, through the Dominion of Canada, to Detroit, had jointly established and were operating a continuout "all-rail" fast freight line known as the "North Shore Despatch" from Palmer's Docks, in the Borough of Brooklyn of the City of New York (which is in the Eastern District of New York) and Palmer's Warren Street Terminals in Jersey City in the State of New Jersey, to Detroit, by way of the Southern District of New York (p. 45).

By the joint tariff established and published by the plaintiff in error, and by it filed with the Interstate Commerce Commission (a written concurrence in which had been filed with the Commission by the Michigan Central) the rate to be charged for the transportation by this route of carload shipments of sugar in barrels or bags from the above mentioned Eastern Terminals (which for convenience will be hereinafter referred to as New York) to Detroit was twenty-three cents for each hundred pounds throughout the year 1904, except during the month of June, when the rate was twenty-one cents for each hundred pounds (pp. 45-46, 52).

During the same time, and prior thereto, there were in operation between New York and Detroit lines operated by common carriers engaged in carrying sugar from New York to Detroit wholly by water (p. 53). One of these "all water" routes was by canal boats from the refineries of the two American Sugar Refining Companies in Brooklyn and Jersey City to Buffalo, where the sugar was transferred from the canal boats into the vessels of the Detroit & Cleveland Navigation Company which operated a line running from Buffalo to Cleveland and Detroit, the sugar being transferred at Buffalo while the vessels lay alongside each other in the water (p. 56). The rate by the "all-water" route in force in 1904 was thirteen cents for each hundred pounds. This was lower than it had been in a previous year, and was an unusually low rate. The "all-water" rate was generally five cents lower than the "all-rail" route (pp. 56-57). It had been customary to ship sugar every season by the "all-water route" (p. 53) and during the year 1904 Edgar & Son shipped upwards of ten thousand barrels (3,500,000 pounds) of sugar by that route (p. 56).

During the period covered by the indictment Lowell M. Palmer, a director of the American Sugar Refining Company of New Jersey, had charge of the traffic business of both of the sugar companies. Except in the case of very small shipments, his office named the rate to the companies and selected the route. Thomas P. Riley, who was paid by Palmer, acted as traffic manager for the companies under Palmer's direction (p. 54).

On April 11, 1904, Palmer addressed a "personal and confidential" letter to the defendant Guilford which, as the learned trial judge told the jury,

> "practically asked Mr. Guilford to make a reduction in the tariff rate on sugar to be shipped by these sugar companies to Edgar on the grounds stated in the letter; particu-

larly that Edgar & Company threatened or proposed to ship their sugars by the canal or by the all-water route, at a considerably less rate" (p. 74).

Palmer's letter was as follows (Exhibit 20, pp. 91-92):

"Office of Lowell M. Palmer,
184 Front Street,
NEW YORK, April 11, 1904.

Personal and confidential.

Mr. NATHAN GUILFORD, Traffic Manager,
N. Y. C. & H. R. R. R., New York City.

DEAR SIR:

A very serious state of affairs seems to threaten us in regard to shipments of sugar for W. H. Edgar & Son, Mr. Edgar's son called on me last week with a proposition to the effect that they would like this season to have their shipments of sugar made from New York by canal to Buffalo, we prepaying charges up to that point only. They state that they have an arrangement with the Detroit & Buffalo Line to take the sugars at Buffalo for distribution to Detroit and Edgar's other points in Michigan.

I wrote Mr. James Edgar on April 6th in regard to this matter, as per copy of my letter attached, and I beg to call your attention to his reply of April 8th. They figure that they can land sugars in Detroit, via canal to Buffalo and thence via D. & B. Line, for say 13 cents per cwt. which rate is divided 7 cents to Buffalo, one cent for handling at that point, and five cents per cwt. for the D. & B. Line haul to Detroit.

I enclose also, for your personal information and to be returned to me without fail, Detroit & Cleveland Navigation Company's tariff I. C. C. 66, showing rates on sugar from Cleveland to various points in Michigan, applying on sugars originating at Eastern points and received from the Lake Lines at Cleveland. The D. & C. Navigation Co., as you understand, is the same as the Detroit & Buffalo Line, and Edgar states that he has an arrangement with Mr. McIntyre

to apply beyond Detroit the rates mentioned in the right hand column of tariff, less the proportion between Cleveland and Detroit, of 4½ cents. This would give Edgar a through rate, to Grand Rapids, for instance, of 17½ cents. Edgar is in a very trying position in the State of Michigan, with the severe competition that he is experiencing with the Michigan beet sugars and with Arbuckle Brothers, and it seems quite certain, from the position he has taken, that something must be done for him in the way of rates this season. I think, if we could arrange to give him a net rate all rail, of 18 cents per cwt. to Detroit, and the same relative basis to other Michigan points, that we could make an arrangement with him whereby these shipments would be confined strictly to the New York Central and West Shore Fast Freight Lines throughout the entire year. If some arrangement of this kind cannot be made, it is quite certain that Edgars business will be put on the canal and rate arranged on it by himself beyond Buffalo. If such a course is pursued, it will simply mean the disintegration of the present understanding for the division of the sugar traffic, as, if a large shipper like Edgar is permitted to make his own rates, it will only be a very short time before every other large wholesale grocery house in the United States will want the same privilege.

As you can easily see, this is a matter of the most vital importance, not only to us but to the railroad companies, and I sincerely trust that you will see your way clear to giving us authority to make such an arrangement with Edgar as will confine his business to the all-rail route.

Please be kind enough to see that the D. & C. N. Co's tariff is returned to my hands, as it is the only one that I have. In order to help out this matter, and to keep Edgar's sugar off the canal I on my part would be willing to accept on their shipments 3 cents per cwt. instead of the regular 4 1/5 cents.

You understand that, before the time that sugar was put into fifth class, the rate to Detroit by the standard lines was 20 cents per cwt. as against the differential line rate of 18 cents, and if this latter figure can again be secured for them, I am quite hopeful that we can make a satisfactory arrangement with Edgar which will do away with his demands for canal-and-lake shipment.

Yours very truly,
LOWELL M. PALMER."

Fifteen days later the defendant Pomeroy, who it appears had meanwhile conferred on the subject with Riley by telephone, answered Palmer's letter as follows (Exhibit 5, pp. 46-47):

"New York Central & Hudson River R. R. Co., West Shore Railroad, Grand Central Station, F. L. Pomeroy, Ass't Traffic Manager.

NEW YORK, April 26th, 1904.

Private and Confidential

LOWELL M. PALMER, Esq.,
1184 Front Street,
New York City.

DEAR SIR:

Referring to your letter of April 11th, and my conversation over the 'phone yesterday, the 25th instant, with your Mr. Riley, which I understand was repeated to you and verified, all in regard to sugar shipments for W. H. Edgar & Son.

This is to advise that, taking effect immediately, we will undertake to handle Edgar's shipments for Detroit and such shipments are to be reforwarded from there to points on the Michigan Central R. R. at a rate of 18 (eighteen) cents per 100 lbs. New York to Detroit, all rail, shipments to be billed at tariff rates and refund made by voucher.

This arrangement is made in consequence of the through rate *via* canal and lake and rail put in by the Detroit & Cleveland Navigation Co. in connection with the Michigan

Central, Grand Trunk, Pere Marquette, and G. R. & I. Roads, effective April 22nd, 1903, and which rates I understand have been renewed for the season of 1904.

This arrangement will cover shipments out of New York from both the American and Howell Refineries, and will also apply from Yonkers, if shipments are made from that point. The question as to Howell's being advised of this private arrangement with Edgar rests in abeyance until the writer can have a personal interview with you regarding same.

As advised over the 'phone I think it would be well to confine this arrangement to Edgar's traffic, as outlined above, leaving his traffic that is going to points on the Grand Trunk, Pere Marquette and G. R. & I. Roads to move via such lines as he may elect, with the understanding that where he can favor either the West Shore or this Company, as far as the haulage to Buffalo is concerned, he will undertake to do so.

Please advise if satisfactory and understood.

Yours truly,

F. L. POMEROY."

This arrangement was evidently "satisfactory and understood" for shipments to Edgar & Son commenced immediately, and continued almost daily from that time until the 31st of October following (p. 47), the full tariff rate on each shipment being prepaid by the sugar companies (pp. 47-49, 53, 61).

At the times and places mentioned in the indictment claims for the difference between the rate so paid, and the rate named in Pomeroy's letter of April 26 (amounting to the sums specified in the indictment) were filed with the plaintiff in error by Palmer claiming to act on behalf of Edgar & Son (p. 47). These claims—*seven* in all—distinguished by the numbers given them in Palmer's office, viz.: 36,476, 36,476A, 36,690, 36,876, 37,100, 37,373 and

37,776, and arranged in their chronological order, were as follows:

1. (7th count) No. 36,476 was for a refund of $285.71 in respect of "divers and various" shipments during April and May (p. 61).

2. (2nd Count) No. 36,476A was for a refund of $1,524.99 in respect of other May shipments (pp. 61-62).

3. (6th Count) No. 36,690 was for a refund of $539.40 in respect of the June shipments (p. 62).

4. (3d Count) No. 36,876 was for a refund of $1,192 in respect of the July shipments (*Id.*).

5. (*Id.*) No. 37,100 was for a refund of $1,282.38 in respect of the August shipments (*Id.*).

6. (4th Count) No. 37,373 was for a refund of $2,117.90 in respect of the September shipments (*Id.*).

7. (5th Count) No. 37,776 was for a refund of $1,971.44 in respect of the October shipments (*Id.*).

The claims were made up by one of Palmer's employees from copies of the way bills which were received in Palmer's office each day. From these extracts were made of the number of pounds in each shipment, the rate at which the freight charges were prepaid, and the point to which the shipments were consigned, and at the end of each month a tabulation was made of the total number of pounds and the amount of the claim was arrived at by dividing this total by one hundred and multiplying it by five (p. 61).

Claims Nos. 36,476 and 36,476A were sent to Pomeroy with a "Personal" letter from Palmer, dated July 14, in which Pomeroy was requested "to put them through for prompt adjustment" (p. 92). The others probably reached Pomeroy in a similar manner, although there is no direct evidence on

that point. Pomeroy in turn, forwarded them to the office of William F. Wilson, general manager of the New York Central and West Shore Fast Freight Lines (which included the "North Shore Despatch") in Buffalo to whose office claims against the companies concerned in the lines went for payment. Wilson's office made up the claims, made vouchers for them and paid them. Whenever a claim against any of the lines was paid the payment was charged by prorating it over the constituent lines (pp. 57-58).

There is no evidence as to when claim No. 36,476 (the "divers and various" April and May shipments) was sent to Mr. Wilson or how it reached him. No. 36,476A (the other May shipments) was sent to him on July 16; No. 36,690 (June shipments) on August 3; No. 36,876 (July shipments(on August 30; No. 37,100 (August shipments) on September 24; No. 37,373 (September shipments) on October 22, and No. 37,776 (October shipments) November 21 (pp. 122-127), each being enclosed in a "personal" letter in which Pomeroy asked Wilson to

> "arrange to reduce the charges" on the shipments "to the basis of 18c. per 100 lbs. . . . prorating on basis of earnings between the New York Central and Michigan Central roads" (pp. 92-96).

It appears that two classes of claims went to Wilson's office for payment. Claims for loss and damage and those arising out of switching and terminal relations with other roads belonged to one class. These went to the chief clerk, were vouchered, and were then sent to the Central Clearing House, whose office was in the same building. The other class, as to the nature of which the evidence is silent except for Mr. Wilson's statement that two of Palmer's were claims of that character (p. 59), was handled by a clerk named Embleton (pp. 57-58, 60). Claims of this class were usually

paid by cashier's checks, which the latter procured at Embleton's request from the Bank of Buffalo (where the cashier kept an account made up of moneys received from the various constituent lines) and then turned over to Embleton (p. 60). The claims themselves were kept until there was an audit, which occurred every three months, when, there being no further use for them, they were destroyed (pp. 58-59).

Wilson testified that Embleton handled this class of claims in 1904 and until March 17, 1906, when he went to San Antonio, Texas, on sick leave and that he had not returned at the time of the trial. He testified further that he *thought* Embleton kept a record of these claims in a book. He said he had not produced this book, although subpœnaed to produce it, because he did not know where it was. He said he had seen it in Embleton's custody, on his desk, but had not seen it since the latter's departure, although he had since made a search for it, and that he may not have seen it for a year or probably six months previous to that time (*Id.*).

All of the claims mentioned in the indictment except No. 36,476 (which was paid September 20 by a cashier's draft on the Metropolitan Trust Company of New York, purchased by the cheque of the Merchants' Despatch Transportation Company, p. 81), were paid by Cashier's cheques—five in number—of the Bank of Buffalo, drawn on the Chemical National Bank of New York to Palmer's order, dated August 23, September 12, October 26, November 10 and December 19, respectively (Exhibits 7, 8, 9, 10 and 11; pp. 85-87). These cheques were forwarded by Embleton (p. 59) to Pomeroy (pp. 87-89) who transmitted them to Palmer or Riley, obtaining Palmer's receipts which he subsequently returned to Wilson's office (p. 96).

All of these cheques and the Metropolitan Trust Company drafts were deposited in Palmer's account

in the Market & Fulton National Bank (p. 62), were paid through the New York Clearing House (p. 60) and were liquidated with the plaintiff in error's funds (p. 68).

No evidence was introduced showing or tending to show that the board of directors, any member of the board, any officer or stockholder of the company, or any of its agents, other than Guilford and Pomeroy, were parties to, or had any knowledge whatever of the "unlawful agreement and arrangement" between the latter and Palmer; nor was anything adduced indicating knowledge on the part of any of the company's officers, directors, stockholders or agents, other than the defendants Guilford and Pomeroy, of the real nature of Palmer's claims and the payments made to him.

Palmer himself testified:

> "I never sent Mr. Newman any written communication on the subject. I never had any conversation with him at all, nor with any other officers of the New York Central Railroad Company except Mr. Guilford or Mr. Pomeroy.* No other officer of the company had any knowledge of the matter from me" (p. 57).

There was, moreover, no evidence of any other similar transaction, much less of any general practice or course of dealing by those in charge of the freight department, from which an inference of knowledge on the part of the higher officials of the company could be drawn. The Government's case, in short, rested upon proof of the acts of Pomeroy, and the subsequent payments out of the corporate treasury made through the Buffalo office pursuant to his arrangement with Palmer.

Both parties having rested on the evidence introduced by the government, the plaintiff in error moved that the jury be directed to render a ver-

*Neither was an officer of the company. Mr. Guilford did not become a vice-president until May, 1905 (p. 64).

dict of acquittal as to it upon various grounds, and among others:

(*a*) That the Elkins Act was unconstitutional and void, because it sought to punish Pomeroy criminally for individual acts committed within the scope of his employment by the plaintiff-in-error, and at the same time to impute to the plaintiff-in-error, and punish it for the same acts, thus imposing a double punishment therefor, notwithstanding the plaintiff-in-error did not and could not participate therein otherwise than by its agents or employees (pp. 69-70 [13]).

(*b*) That the provision of section 1 of the Elkins Act, in substance, that the act of an agent shall be deemed also the act of the corporation was unconstitutional and void in that it involves, necessarily, the imputation directly to the corportation, without further proof, of criminal intent, if found in the agent, and operates to subject the corporation to criminal liability merely because of the commission of an unlawful act by an agent in the course of a lawful business entrusted to him by the corporation, and thus to inflict a punishment by way of penalty upon the stockholders for the act of such agent (p. 70 [17]).

(*c*) That the indictment was bad for the misjoinder, as defendants, of the plaintiff-in-error, for the same alleged acts or omissions; that it appeared from the evidence that the acts or omissions charged in the indictment were of such a character that the plaintiff-in-error and its agents could not, in law, be guilty of a joint offense in doing what was therein set forth, that the offense or offenses therein charged did not wholly arise from the joint action of the two defendants on trial, and that a joint indictment against them for the supposed acts therein charged could not be sustained (p. 68 [1-3]).

(*d*) That the indictment was bad (*a*) for ambig-

uity and uncertainty and (*b*) because of its omission to allege directly that any advantage had been given or discrimination practised by the giving of the alleged rebates; that it could not be regarded as a valid indictment for a wilful failure strictly to observe the published tariff rates, since it nowhere alleged sufficiently the time, place or particulars of such failure, or that it was wilful; that none of the counts charged the commission of acts constituting an offense under the Elkins Act or under any other statute of the United States, and that it was bad for all the reasons set forth in the demurrer, and in the motions to quash (pp. 68-70 [4, 5, 7-9, 14, 15]).

(*c*) That there was no evidence to show that those who controlled or were responsible for the corporate action of the plaintiff-in-error authorized or ever knew of any of the acts or alleged acts of Pomeroy or Guilford, and that the facts established by the evidence did not establish the commission of any crime by the plaintiff-in-error (pp. 69-70 [10-16]). This motion was denied.

The plaintiff-in-error requested the court to charge the jury that upon all the evidence it was their duty to render a verdict of not guilty (p. 77 [1]), that the provision of the Elkins Act making the act of an agent of a carrier corporation the act of such carrier was unconstitutional and void, and must be entirely disregarded by the jury (p. 80 [24]), that the plaintiff-in-error must be acquitted because of the absence of any proof that it did or authorized the acts charged in the indictment in its corporate capacity, by direction of those controlling its corporate action (p. 79 [16]), and that the plaintiff-in-error could in no event be convicted of a criminal intent to commit the crime of giving rebates (*Id.* [15]).

Each of these requests was refused, exceptions being duly taken (pp. 77-79).

In charging the jury the trial judge stated generally the provisions of the Act of 1887 requiring the filing and publication of joint tariffs and forbidding any advance or reduction except after notice. He quoted the clauses of that Act forbidding any common carrier to charge, &c., a greater or less compensation than that specified in a joint tariff, to which it was a party, and making it a misdemeanor for any such carrier, or in the case of corporations, any director, or officer, &c., thereof, to wilfully do any act prohibited thereby, or to wilfully omit to do any act thereby required to be done, &c. He explained that the original statute had been amended and in some respects superseded by the Elkins Act (pp. 70-72), and read to the jury all of section 1 of that Act, except the second clause.

He then instructed the jury in substance, that a separate crime was alleged in each of the six counts, and that while criminal intent was an essential element of the offense charged, that intent on the part of the plaintiff in error might be inferred from the acts of its agents Guilford and Pomeroy as disclosed by the evidence.

The jury having returned a verdict finding both of the defendants "guilty of *rebating* on all the counts of the indictment from the second down to the seventh inclusive" (p. 84), the plaintiff in error moved that the court set aside the verdict and for a new trial on various grounds, and among others, because of its errors in denying the motion to quash and dismiss the indictment for the misjoinder of defendants, in denying the motion to direct or advise an acquittal, in charging the jury, and in refusing to charge as requested, and because the verdict was contrary to law (pp. 84-85).

The plaintiff in error also moved in arrest of judgment for errors apparent upon the face of the record, the following objections being among those particularly specified (pp. 85, 97-100):

(*a*) That the indictment was defective in form and substance for the various reasons previously urged (pp. 98-99 [1, 3-11, 12-14, 15-18]).

(*b*) That the Elkins Act was enacted in excess of the power conferred upon the Congress by the constitution in that it subjected the plaintiff in error to the payment of a pecuniary fine for acts committed by its agents in which it did not in any manner participate, thus imputing to it and punishing it criminally for acts which it did not commit, thereby depriving it of its property without due process of law, and infringing its rights, privileges and immunities under the constitution (pp. 99-100 [19-22]); and

(*c*) That the verdict was irregular and void in finding the plaintiff in error guilty of six separate offenses, whereas the matters described and set forth in the indictment constituted but one offense (p. 100 [24]).

The court denied the motion and rendered the judgment now here for review (p. 85).

SPECIFICATION OF ERRORS RELIED UPON.

The plaintiff in error contends that the Circuit Court erred:

FIRST.

In holding that Congress has power under the constitution to impute to the plaintiff in error the commission of a criminal offense and to subject it to a criminal prosecution and punishment by reason of the matters set forth in the indictment (Demurrer, p. 28; motion to quash, pp. 41-42 [1-8, 13]; motion to direct acquittal, p. 70 [17]; motion in arrest of judgment, p. 100 [23]; 1st assignment of error, *Id.*)

SECOND.

In sustaining the constitutionality of the first clause of section 1 of the Elkins Act, the contention of the plaintiff in error being

(*a*) That this provision infringes the plaintiff in error's "rights, privileges and immunities . . . under the Fifth Amendment to the constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, thus depriving it of property without due process of law (5th Assignment of Error, p. 101);

(*b*) That the Elkins Act is "void in so far as it seeks to punish . . . Pomeroy" (the plaintiff in error's agent) "criminally, for an individual act or acts on his part, committed by him within the scope of his employment" by the plaintiff in error, "and at the same time seeks to impute to" the plaintiff in error "and punish it for the same act or acts, and thus impose a double punishment for the same act or acts (6th *Id.*, p. 101), and

(*c*) That the Act "undertakes to make corporations punishable by fine for the acts of their agents, in which such corporations are incapable in law of participating" and thereby "to subject the innocent stockholders of such corporations, who take no part in such acts, to punishment without process of law" (7th *Id.*, p. 101).

In each of the following specific rulings, all of which assumed the validity of the provision in question:

1. In refusing to instruct the jury as follows:

> "The provision of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (93rd *Id.*, pp. 109-110).

2. In refusing to direct the jury at the close of the evidence to acquit the plaintiff in error because the facts proven by the Government did not establish the commision of any crime by it (63d *Id.*, p. 106).

In refusing to charge the first request (p. 77):

> "That upon all the evidence it is the duty of the jury to render a verdict of not guilty" (74th *Id.*, assignment of error, p. 107).

And in refusing to charge the 16th request (p. 79):

> "That the defendant corporation cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity, by direction of those controlling its corporate action, it did or authorized the acts charged in the indictment, and as there is no proof thereof, it must be acquitted" (87th assignment of error, p. 109).

3. In charging the jury on the question of the criminal intent of the plaintiff in error:

> "There are cases, however, in which intent may be inferred from the act itself, and it will be a question for you in this case whether intent is not inferrable from the agreement contained in this letter of April 26th, in which Mr. Pomeroy says: 'This is to advise that taking effect immediately we will undertake to handle Edgar's shipments for Detroit, and such shipments as are to be reforwarded from there to points on the Michigan Central Railroad at a rate of 18 cents per 100 pounds New York to Detroit, all-rail, shipments to be billed at the tariff rates, and refund made by voucher'" (Charge, p. 76; Exception, p. 81; 69th assignment, pp. 106-107).
>
> "On this question of intent, also, gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guilford was headed private and confidential. It will be proper for you to

take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct cheque drawn at Buffalo by or on behalf of this defendant was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical Bank in favor of Mr. Palmer" (Charge, p. 76; Exception, p. 81; 70th assignment, p. 107).

"Now it is for you to say, gentlemen, whether these occurrences and these facts are consistent with innocence or with guilt, because if a man carries on an act, or any person does anything upon which its face is apparently unlawful, and he does it in a furtive and secret manner, showing that his intention while he does the act is to do it in such a way as to conceal it, the jury may draw the inference from that fact—they are not obliged to, but they may, if they see fit—that the intention with which the act was done was to perform an illegal or a criminal act (Charge, p. 77; Exception, p. 81; 71st assignment, p. 107).

"And indeed, gentlemen, you may draw such an inference if you see fit, from the general nature of a rebate" (Charge, p. 77; Exception, p. 81; 72nd assignment, p. 107).

"If this was an honest transaction and there was a just reason why this railroad company should charge the American Sugar Company 18 cents a 100 instead of 23 cents per 100 on their shipments to Edgar why did not they take cheques in payment for the 18 cents a 100? What is the inference to be drawn when men carry on the business in this way of paying the full tariff rate and then months afterwards paying back a rebate for the simple purpose of accomplishing what they might have accomplished by sending a cheque in the first place for the difference? It is for you to say" (Charge, p. 77; Exception, p. 81; 73rd assignment, p. 107).

4. In refusing to instruct the jury:

"That if the jury find as a fact that the

evidence shows no more than this, that rebates on sugars carried by this defendant were given by the two defendants Guilford and Pomeroy without the knowledge of this defendant's president, or executive officers, or directors or any officer beyond the two defendants Guilford and Pomeroy, then the defendant the New York Central & Hudson River Railroad Company should be acquitted" (3rd request, pp. 77-78; 75th assignment, pp. 107-108).

"That the jury must not guess or conjecture, but the Government is bound to prove beyond a reasonable doubt, not only that the defendants Guilford and Pomeroy gave rebates, but also that the giving of such rebates was in fact authorized by those who controlled the corporate action of the defendant corporation" (4th request, p. 78; 76th assignment, p. 108).

"That even if the jury find as a fact that rebates were given by the defendants Guilford and Pomeroy, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except the defendant Guilford, then this defendant corporation must be acquitted" (6th request, p. 78; 78th assignment, p. 108).

"That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the corporation authorized or knew of the giving of any unlawful rebates by Guilford and Pomeroy, then the defendant corporation must be acquitted (17th request, p. 79; 88th assignment, p. 109).

"That even if the jury find a criminal intent in the defendant Pomeroy the jury cannot impute that intent to the defendant corporation" (13th request, p. 79; 84th assignment, p. 109).

"That the jury cannot make a finding of criminal intent against the defendant corporation, and base that finding solely on

a finding of criminal intent against the defendant Pomeroy (14th request, p. 79; 85th assignment, p. 109).

"Criminal intent on the part of the corporation cannot be inferred solely and merely from the fact that a rebate was given as charged in the indictment, if the jury find that such rebate was given (p. 82; 97th assignment, p. 110).

"That if the jury find that the essential nature of the rebates alleged to have been given was deceit and secrecy, and that as a matter of fact the giving thereof was kept secret from those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted" (26th request, p. 80; 95th assignment, p. 110).

"That in order to find that the defendant Pomeroy or Guilford was acting within the scope of his employment, the jury must find as a fact beyond a reasonable doubt, not merely that such agent had authority to establish lawful rates, but must also find that such agent had authority to make the unlawful rates alleged in the indictment" (27th request, p. 81; 96th assignment, p. 110).

THIRD.

In holding that the Elkins Act permits the joinder of defendants in the manner attempted in this indictment, and is constitutional if so construed (8th and 9th *Id.*, p. 101), and that the indictment was not bad for such misjoinder (22d *Id.*, p. 102), the contention on this point being: 1, that the acts or omissions charged were of such a character that the plaintiff in error and its co-defendants could not in law be guilty of joint offenses by reason thereof, and, 2, that the offense or offenses charged could not wholly arise from their joint action (23d to 34th *Id.*, pp. 102-103); and in refusing to instruct the jury to acquit because of such misjoinder (59th and 61st *Id.*, pp. 105-106).

FOURTH.

In holding that the acts described in the various counts of the indictment constituted a crime under the laws of the United States (10th to 15th *Id.*, inc.; pp. 101-102), that they alleged with requisite clearness and certainty the time, place, nature and circumstances of the offense sought to be charged (16th to 21st *Id.*, incl.; p. 102), that they were not bad for ambiguity and uncertainty (35th to 40th *Id.;* pp. 103-104), and also for the lack of any allegation of advantage or discrimination (41st to 46th *Id.*, p. 104), and that they adequately charged a wilful failure strictly to observe published tariff rates (47th to 58th *Id.*, pp. 104-105); and in refusing to instruct the jury at the close of the evidence to acquit the plaintiff in error because of the insufficiency of the indictment (62nd *Id.*, p. 106).

FIFTH.

1. In charging the jury:

> "I charge you that under this Act, the payment of each rebate constitutes a distinct offense, and that you may find by your verdict whether all or any of these offenses were committed by both or by either of these defendants (Charge, p. 74; Exception, p. 81; 65th assignment, p. 106).
>
> "You may find that they are guilty in respect to all six of these offenses, or that one is and that the other is not, and you may find that either of them is guilty in respect to any one of these shipments, if you can draw any distinction between them, and not guilty in respect to any other. The whole question is before you for determination" (*Id.*, 66th assignment, p. 106).
>
> "Now, gentlemen, upon this evidence it is for you to say whether these defendants, or either of them, are guilty of these six offenses, or either of them" (Charge, p. 76; Exception, p. 81; 67th assignment, p. 106.)

2. In holding that the verdict (finding the defendants guilty "on the second, third, fourth, fifth, sixth and seventh counts of indictment" [Clerk's minutes, p. 40] or "of *rebating* on all the counts of the indictment from the second, down to the seventh, inclusive" [Bill of Exceptions, p. 84]) was regular and valid (98th assignment, p. 110), and in rendering judgment thereon (99th *Id.*, p. 110); and

3. In imposing cumulative sentences and sentencing the plaintiff in error to payment of more than a single fine (100th and 101st assignments, *Id.*).

SIXTH.

In charging the jury upon the question of the criminal intent of the plaintiff in error:

> "You may take into consideration upon that question the evidence in this case that the original claims presented by Palmer to Pomeroy, and sent by Pomeroy to Wilson, have been destroyed; and the fact that when Embleton, the man in charge of these shipments, left the employment there, a book containing entries in reference to these claims, disappeared and that Mr. Wilson testified in this case that he did not know where it was" (charge, pp. 76-77; exception, p. 81; 68th assignment, p. 106).

BRIEF OF THE ARGUMENT.

FIRST.

Congress is without power under the Constitution to impute to the plaintiff in error the commission of a criminal offense and to subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

The object of the criminal law is punishment. Punishment can only be visited upon the guilty. A fine assessed against a corporation, which acts "by its majority" mulcts, not only the latter, but also the dissenting majority. The result, sometimes, if not in the majority of cases, is to punish the innocent as well as the guilty, which is oppression.

To take the money of a corporation because the individuals who control its corporate action have committed a crime, is to take that in which every stockholder has a property interest, and is therefore to take his property. To do this, unless every stockholder has been, in fact, party or privy to the transaction for which it is done, is to punish the innocent for the crime of the guilty. No one would assert that this could be done through a criminal prosecution directed against the entire body of stockholders in their *private* capacity. There is no more justification in law or morals for doing the same thing by means of a prosecution directed against the same body in their *corporate* capacity. In either case the result is to punish the innocent stockholders, and to punish them, moreover, in a proceeding to which they are not parties, without proof of their personal guilt, and without any opportunity of being heard.

The modern doctrine of the indictability of corporations for wrongs other than those which are in the nature of *nuisances*, has no justification in the principles which underlie our system, or any civilized system, of criminal jurisprudence.

Public policy may demand that a private or corporate master be held responsible in damages for the negligent or even wanton acts of a servant committed within the scope of the latter's employment. The purpose of the civil remedy is, however, *compensation* for *private* wrongs; not *punishment* for *public wrongs*.

But public policy does not permit, much less demand, that a person or association should be punished through criminal proceedings on account of a wrong committed by another. "This," says *Morawetz* (Priv. Corp., §732) "would be contrary to the sense of natural justice." This should seem to be a conclusive impediment to the criminal prosecution of any innocent person. Yet *Morawetz* (*Id.*) and *Brice* (*Ultra Vires* [Green's Am. Ed.] 271) and many other writers, apparently forgetting that an individual does not cease to be such by becoming a stockholder in a corporation, draw a distinction between ordinary crimes, and those statutory offenses in which "the intent is notional and constructive" or "the mental element is negligence" (Brice), and hold with Bishop (New Cr. L., §417 [2], that, while a corporation "cannot in its corporate capacity commit a crime by an act in the fullest sense *ultra vires* and contrary to its nature" (as though *all* crimes committed by corporate agents were not *ultra vires* in the fullest sense), nevertheless "within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act *as a corporation*, it has the same capabilities of criminal intent and of act —in other words, of crime—as an individual man sustaining to the thing the like relation."

This is a proposition of vast and indefinite extent, conveyed in language which has a sort of obscure dignity. But the moment we examine the proposition and subject it to the test of reason we find it false in premise and conclusion. A corporation is a mere name given to a body of individuals. Its "corporate capacity" does not extend beyond the limits of personal action vested in the individuals who compose it. "It" never assumes to act as a corporation, or at all, except as these human beings make use of their own physical or mental energies. So far from possessing "the *same* capabilities of criminal intent and of act" as the individuals who compose it, the corporation's capabilities in that regard are limited to those of its constituent members, and exist only in so far as they exist in those individuals. When they act, within or beyond the sphere of its corporate capacity, it acts, only, however, because, and by reason of, such individual action. Its capacity for crime is, therefore, not "the *same* as an individual man sustaining to the thing the *like* relation." The very most that can be said of it is that it *is* the capacity which the majority of its human agents sustain to the thing. As was said by Weston, *C. J.*, in *State* v. *Great Works Mill Co.*, 20 Me., 41 (followed in *State* v. *O. & M. R. R. Co.*, 23 Ind., 362):

> "A corporation is created by law for certain beneficial purposes. They cannot commit a crime or misdemeanor by any positive, affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may, by a vote entered upon their records, require an agent to commit a battery, but if he does so, it cannot be regarded as the corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable, as a corporation, for an offense thus incited by them, the innocent dissenting minority become equally

amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted as individuals, or as aiding and abetting or procuring an offense to be committed, according to its character or magnitude. It is a doctrine, then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted."

In England corporations are now held to be indictable for statutory offenses not involving the element of *mens rea* by virtue of an Act of Parliament by which the word "person" when used in a statute is deemed to include corporations, unless a contrary intention appears in the statute. Prior to the enactment of this legislative authority the English courts had held that corporations might be guilty of offenses, the remedy of which is a public prosecution, *e. g.*, the non-repair of a highway. But, as Nathaniel Lindley (afterwards Mr. Justice Lindley) observes: "Such acts are not crimes in any accurate sense of the word, and, using the term criminal law, in its natural and popular sense, it may fairly be said that it has no application to any except natural persons."

2 Jurid. Soc. Papers, 31.

The Elkins Act and many other federal statutes undertake to authorize the indictment of corporations, but such legislation, unlike an act of the English Parliament, is of course without effect, if enacted without or in excess of the power conferred upon Congress by the federal constitution.

We contend that the Elkins Act, and all other statutes undertaking to subject corporations to criminal prosecution and punishment for offenses committed by their agents, are unconstitutionad and void, in that their necessary effect is to punish innocent stockholders for the criminal acts of others,

and thus deprive them of property without due process of law.

There are many federal and state authorities to be found in the books for the legislation which we attack. Perhaps the latest decision on the point is that of *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. Rep., 835, in which the court, in sustaining an indictment charging two corporations and their respective presidents with a *conspiracy* in restraint of interstate commerce, said:

> "The doctrine, much older than the *Dartmouth College Case*, 4 Wheat., at 636, 4 L. Ed., 629, but there fixed in federal jurisprudence, that a "corporation is an artificial being, invisible, intangible, existing only in contemplation of law, and, being the mere creation of the law, it possesses only those properties which the charter of its creation confers,' has been the excuse for much idle and artificial reasoning. It was long contended that even a civil liability arising from evil intent could not be visited upon an artificial being. This fiction has vanished, and corporate liability on the civil side firmly established, even for assault (*Lake Shore, etc., Ry.* v. *Prentice*, 147 U. S., 101, 13 Sup. Ct., 261, 37 L. Ed. 97), or conspiracy (*Buffalo Oil Co.* v. *Standard Oil Co.*, 42 Hun, 153; *id.*, 106 N. Y., 669, 12 N. E., 826; *West Va. Trans. Co. v. Standard Oil Co.*, 50 W. Va., 611, 40 S. E., 591, 56 L. R. A., 804, 88 Am. St. Rep., 895). It was even longer denied that a corporation could be indicted at all. *Regina* v. *Great, etc., Ry.*, 9 Q. B., 314. In *People, etc.*, v. *Clark, supra*,* the court declares that the legal reasoning upholding this contention was the strange argument that a corporation could not plead in person, and therefore could not be called on to answer criminally. It certainly now is admitted law that, not only may corporations (the art of pleading by attorney having been discovered) be indict-

*14 N. Y. Supp., 642.

ed for nonfeasance, but for such deeds of misfeasance as are complete by the mere doing of the thing prohibited, *e. g.*, violation of the eight hour law (*United States* v. *John Kelso Co.* (D. C.) 86 Fed., 304); receiving usurious interest (*State* v. *First Nat. Bank*, 2 S. D., 568, 51 N. W. 587); not stopping gaming at a fair (*Commonwealth* v. *Agricultural Soc.*, 92 Ky. 197, 17 S. W. 442). Authority is still producible, however, for the dogma that corporations "cannot be indicted for offenses which derive their criminality from evil intention" (*Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray [Mass.] 339), nor "for any crime of which a corrupt intent or *malus animus* is an essential ingredient" (*State* v. *Morris & Essex Ry.*, 23 N. J. Law, 260. Therefore, these defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, inherent impossibility renders the accusation futile. I think this is but the remnant of a theory always fanciful and in process of abandonment. The process is slow, but in *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, a court of great authority recently held in a proceeding for criminal contempt: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil." And to the same effect *State v. B. & O. R. R.*, 15 W. Va. 362, 36 Am. Rep. 803. It is notable that the older cases asserting the immunity here contended for are rarely decisions granting such immunity, but speak of it as something theoretically true, yet not applicable to the matter in hand. It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable

> to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest. The limitation of power does not depend upon the difficulty of imputing evil intent, but upon the impossibility of visiting upon corporations the punishment usually prescribed for greater crimes. The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not in my opinion, bear discussion."

The fundamental unsoundness of the reasoning of this case, and those which are cited in the opinion, lies in its utter disregard of the essential difference between the privileges governing *civil* and *criminal* liability. If it is "admitted law" that corporations may be indicted for *nonfeasance*, it is, as Mr. Justice Lindley pointed out, only because such acts are "not crimes in any accurate sense of the word." "Such deeds of misfeasance as are complete by the mere doing of the thing prohibited" are, however, crimes in every sense of the word, and stand on precisely the same footing as those "which derive their criminality from evil intention." The obstacle to imputing to a corporation crimes of either character, is that the result is to punish innocent individuals. It may be "as easy and logical" to ascribe to a corporation an evil mind as to impute to it a sense of contractual obligation, but to do so in the former case is to ascribe an evil mind to every stockholder regardless of its existence in fact, whereas the contractual obligation inheres in the fact of stock ownership. Doubtless "the same law which creates the corporation may create the crime," but we nevertheless assert it as an unanswerable proposition that the legislature cannot, under our constitution, under pretext of punishing its own creatures, actually punish innocent people.

If a stockholder himself commits or commands or procures the commission of a crime by a corporate agent, either or both may be indicted and punished. But to ascribe their guilt to the whole body by a fiction is to condemn, not for actual, but for ideal and constructive guilt, which is legal innocence—a notion abhorrent to the principles of free government.

We cannot better conclude our argument on this point than by quoting the following passage from Mr. Justice Lindley's paper:

> "Can a corporation be guilty of a crime? Some jurists say 'Yes'. But 'no' seems to be the proper answer to the question. No one is responsible for a crime who is not personally party or privy to it. *Crime is never imputed to any one by a fiction*, but it is only by a fiction that a corporation can be deemed guilty of a crime. To contend that a corporation can be guilty of a crime, is therefore to contend for that in the case of a corporation which has no analogy in the case of ordinary individuals. Nor would there be any use in establishing such a doctrine. The object of criminal laws is to punish. Punishment, to be effectual, must fall on beings who can feel; in the case of corporations, therefore, it should fall on the individuals who have been guilty of the crime perpetrated. Nor ought they, nor can they on any principle be screened from punishment on the ground that the guilt is imputable to the corporation; for, admitting that to be so, they are not the less also punishable, having, *ex hypothesi*, themselves committed the criminal acts in question. Those who maintain that corporations can commit crimes are driven to make exceptions; for no jurist asserts that adultery or bigamy can on any principle, or by any analogy, be imputed to bodies corporate" (2 Jurid. Soc. Papers, at pp. 34-35).

SECOND.

If correctly interpreted by the court below, the fourth clause of Section 1 of the Elkins Act which declares that in construing and enforcing the provisions of that section thereof, "the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person," is unconstitutional. If misinterpreted by the court below the case was submitted to the jury upon a fundamentally erroneous theory.

Brief Statement of the Constitutional Question.

The fourth clause of the Act applies in terms to *any* carrier engaged in interstate commerce, and, as construed by the court below, extends the principle of *respondeat superior* to criminal law, destroys the presumption of innocence as to all interstate carriers, and erects in its place a conclusive presumption of guilt against the carrier, based upon any unlawful act of *any* agent, although in excess of his actual authority.

If Congress had provided, in terms, that in case any carrier's agent who was authorized to make lawful rates, should, in the course of his employment, make an unlawful rate and be guilty

of the crime of giving a rebate, then his crime should be taken, as a matter of law, to be the crime of the individual carrier, the legislation would, of course, be unconstitutional. The plain difficulty with such a statute would be that Congress, under the guise of regulating commerce, could not destroy the fundamental presumption of innocence, or deny to such carrier the equal protection of the law. Those are underlying principles which are protected under the phrase "due process of law."

How is it possible to sustain as a regulation of interstate commerce a statute which, properly, might be entitled "An Act to deny to all carriers "engaged in interstate commerce the right to the "presumption of innocence and the equal protection "of the laws"?

The learned trial court admitted that such a statute would probably be invalid in the case of individual carriers, but held it constitutional in the case of corporate carriers. This ruling disregarded the principle that a statute which is unconstitutional in part is unconstitutional as a whole, if the valid and invalid parts of the statute are inseparable. This court has refused to "supply quali-"fications which the Legislature has failed to ex-"press" (*U. S.* v. *Fox*, 95 U. S., 670; *Employers' Liability Cases*, 207 U. S., 463). In the present case there is, of course, no possibility of such a severance. Moreover, even if the act had been directed against corporations alone, the presumption of innocence shields a corporation to the same extent that it shields an individual (*Inter. Com. Co.* v. *C. G. W. Ry.*, 209 U. S., 108, 119). Equal protection of the laws as well as due process of law is assured to corporations and individuals alike (*Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S., 150). The rulings of the trial court involved the absolute denial of these rights. The conclusion fol-

lows that if the language of the statute compelled the rulings, the statute is unconstitutional, and, if the statute did not warrant the rulings, then the judgment should be reversed for the erroneous construction of the statute.

Quotations from the Rulings by which the court applied the Doctrine of Respondeat Superior to criminal liability, denied to Plaintiff-in-Error the Right to the Presumption of Innocence and ruled as Matter of Law that the crime of Pomeroy, Assistant Traffic Manager of Plaintiff-in-Error, was the crime of Plaintiff-in-Error.

The court overruled the motion for an order quashing and dismissing the indictment and said:

> "The direct object of it (Elkins Act) was to make the corporation responsible as well as the officers, and *substitute* a *fine* on the *corporation* for the *punishment* of the *person convicted*, by imprisonment. * * * The cases which have been cited of an individual master and an individual servant are essentially different. The argument is very weighty in those cases, but (and?) where the individual servant is guilty of the criminal act in the course of his master's business and there is no evidence whatever that the master consented to it, or had anything to do with it, the general principle of law would be that a statute making the master criminally punishable in such a case as that was invalid. But a *corporation* is an essentially distinct entity. It only acts by its officers and there is no such separation between the corporation and its officers, although they discharge duties which make them for certain purposes under the civil law servants and the relation between them is that of master and servant under the civil law, yet the relation is essentially different from that which would be the relation between an individual master and an individual servant, and I think it is entirely com-

> petent for Congress to provide that a *corporation* shall be *liable criminally* for the *acts* of its *agents*, if it sees fit to do so. That is to say, it makes them *punishable* by a fine for the acts of its (their?) *agents.*" The court then proceeded to state that as matter of fact, every one *knows* "that where rebates are given it is either actually authorized by the corporation, or the agent *supposed* that it was authorized, or that it *would* be approved, and the moneys paid by the corporation are not paid actually by the agent in actual ordinary practice. To say under those circumstances that it is not within the power of Congress to provide that a corporation can be fined because of the action of its agents, *even if the Government is not able to show that the corporation took any part in the proceedings*, it seems to me would be to apply the ordinary principles of master and servant as they exist between individuals to a case which ought not to be strictly governed by them."

The learned court added that even if not guilty of *authorizing* the illegal act of its agent, yet there might be a *"ratification* by the company of the acts of its agents" and that that would be the equivalent of original authority (pp. 43-4). It is safe to say that in the criminal law, a defendant is guilty or not guilty, because of his conduct when the alleged crime was committed, and not because of his subsequent approval or disapproval of the act.

Accordingly counsel requested the court to charge, but the court refused so to charge:

> "That the jury cannot find the defendant corporation guilty upon a finding that the corporation, after the fact, ratified or approved of the giving of alleged rebates." (Request 20, p. 80; Assignment of Error 90, p. 109.)

This, of itself, is enough to require the reversal of the judgment.

> "A principal or master does not become criminally responsible for the act of his

> agent or servant committed without his knowledge or authority, by subsequently ratifying the same. He must be liable, if at all, at the time the act is done."
>
> *Clark & Marshall, Law of Crimes* (2nd Ed.), § 194 (i.), p. 267;

In *Morse* v. *State*, 6 Conn., 9, the court said that "to crimes the maxim *omnis ratihabitio retrotrahitur et mandato equiparatur* is inapplicable."

We come now to the rulings by which the court held that the crime of the agent was, of itself, the crime of the plaintiff-in-error.

It is true that the court did charge the jury:

> "That it is not for this defendant corporation to prove a negative and show that it did not authorize the giving of rebates, but it is for the Government to show such authority and to show it beyond a reasonable doubt, and no unfavorable inference must be drawn against this defendant corporation because it called no witnesses" (Request 7, p. 78).

The view of the court, however, was that authority to make a lawful rate was, of itself, authority to make an unlawful rate. The court, accordingly, refused to charge:

> "That if the jury find as a fact that the evidence shows no more than this, that rebates on sugar carried by this defendant were given by the two defendants Guilford and Pomeroy without the knowledge of this defendant's president or executive officers, or directors, or any officer beyond the two defendants Guilford and Pomeroy, then the defendant, The New York Central and Hudson River Railroad Company should be acquitted" (Request 3, pp. 77-8).

The court refused to charge:

> "That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that the defendants Guilford and Pomeroy gave rebates, but also that the giving

> of such rebates was in fact authorized by those who controlled the corporate action of the defendant" (Request 4, p. 78).

At the trial the court ruled that there was

> "no affirmative evidence that those who controlled the corporation," that is to say (the President and Directors) "authorized or knew of the giving of the rebates alleged in the indictment" (Request 22, p. 83), and, yet, the Court left "that matter as a matter upon which the jury are to pass upon, on consideration of all the evidence in the case!" (*Ibid.*)

This, also, is enough to require a reversal of the judgment, for it is familiar law that a court must not leave to the jury a matter as to which there is no proof.

The court refused to charge:

> "That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant corporation, authorized or knew of the giving of any unlawful rebates by Guilford or Pomeroy, then the defendant corporation must be acquitted" (Request 17, p. 79).

The court also refused to charge:

> "That even if the jury find as a fact that rebates were given by the defendants Guilford and Pomeroy, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except the defendant Guilford, then this defendant corporation must be acquitted" (Request 6, p. 78).

In considering these requests, this court will bear in mind the evidence of the Government's witness Palmer,

> "No other officer of the company had any knowledge of the matter from me" (p. 57).

Intent is, in a certain sense essential to the commission of any crime.

Armour Packing Co. v. *United States*, 209 U. S., 56.

Although the offense charged in the case at bar perhaps belongs to that class in which the intent may be said to be "notional and constructive" (*Brice, Ultra Vires* [Green's Am. Ed.], 271), the offense, nevertheless, consists in "purposely" doing the thing prohibited by the statute and is incomplete without proof of that element. In that sense and to that extent criminal intent is, of course, essential to the commission of the offense.

Armour Packing Co. v. *United States*, *supra.*

The trial proceeded upon the theory that criminal intent must be shown, and a judgment will not be affirmed upon a ground not taken at the trial.

Peck v. *Heurich*, 167 U. S., 624, 629.

The court refused to charge:

> "That even if the jury find a criminal intent in the defendant Pomeroy the jury cannot impute that intent to the corporation" (Request 13, p. 79).

The court refused to charge:

> "That the jury cannot make a finding of criminal intent against the defendant corporation, and base that finding *solely* on a finding of criminal intent against the defendant Pomeroy" (Request 14, p. 79).

The court had charged the jury that "there are cases in which an intent may be inferred on the part of the *corporation* from the act of an *agent*," and that it was for the jury to say whether *such* an intent was not in this case inferable from the letter from Pomeroy itself." (P. 76, Ex. p. 81.) The court had charged the jury that "on the question of the criminal intent of the corporation, the jury might take into consideration the fact that two letters were headed 'Private and Confidential,' and the method in which these transactions were

carried on" (p. 76, Ex. p. 81); also the doing of the act "in a furtive and secret manner, showing that his intention while he does the act is to do it in such a way as to conceal it" (p. 77 Ex. p. 81).

The court charged: "You may draw such an inference" (that is the criminal intent of the corporation) "from the general nature of a rebate" that is to say from the fact alone (p. 77, Ex. p.82).

Of course, under this ruling, all the Government had to do was to prove that some agent gave a rebate, and such was undoubtedly the theory of the court. This appears *passim*, and especially from the action of the court on the request as follows: "Criminal "intent on the part of the corporation cannot be "inferred *solely* and *merely* from the fact that a "rebate was given as charged in the indictment" (p. 82).

"The court refused so to charge and instructed "the jury in lieu thereof:

> "'A repayment may be made for an over-'charge which has no element of crime about 'it, of course; it is done every day. There 'may be a repayment which might be called 'a rebate, but a rebate within the sense of 'the Act, that is a portion paid back without 'consideration out of the full tariff price 'paid for the carriage of goods, is *not* an '*innocent* transaction under the Act and is 'expressly prohibited by it.'"

This instruction amounted to a direction of a verdict of guilty, and, in any view, was fundamental error.

Counsel for the defendant corporation excepted to court's refusal to charge as requested, and to the instruction given in lieu thereof, and explained that

> "the point of the request was that the jury should be charged that criminal intent on the part of the corporation could not be inferred *solely* and *merely* from the fact that the jury might find that a rebate was given as charged in the indictment" (p. 82).

In view of the instruction that the jury might consider the "secret manner" in which Pomeroy acted (p. 77), the defendant requested the court to charge:

> "That if the jury find that the essential nature of the rebates alleged to have been given was deceit and *secrecy*, and that, as a *matter of fact*, the giving thereof *was kept secret* from those *who controlled the corporate action of the defendant corporation*, then that the defendant must be acquitted." (Request 26, p. 80.)

This was refused and exception taken. The court also refused to charge the jury:

> "That in order to find that the defendant Pomeroy or Guilford was acting in the scope of his employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent had authority to establish *lawful* rates, but must find also that such agent had authority to make the *unlawful rates* alleged in the indictment" (Request 27, p. 81).

This court will see that the main charge is almost barren of any reference to this subject.

There is no room for doubt as to the view of the learned trial court, for in the other case argued herewith, the court instructed the jury as follows:

> "If you find that Mr. Guilford *or* Mr. Pomeroy was guilty of charging, demanding, collecting or receiving * * * a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the Commission, you may find the defendant guilty" (p. 87, No. 59).

Thus it will be seen that the court construed the act as if it had made the corporation liable criminally as matter of law, for any act of any agent done in the *course of* his employment, even though beyond the scope of his lawful employment.

Discussion of the Constitutional Question.

If there is such a thing as a guilty corporation

there must also be such a thing as an innocent corporation. This court has held that the presumption of innocence prevails alike whether the defendant in a criminal prosecution be a corporation or an individual.

Int. Com. Com. v. *C. G. W. Ry. Co.*, 209 U. S., 108, 119.

One is not liable, *criminaliter*, for the act of his agent, even though the act be done in the *course*, or even within the general scope, of his lawful employment, in the sense in which we use that phrase in applying, *civiliter*, the doctrine of *respondeat superior*. The presumption of innocence excludes such a criminal responsibility.

It is obvious that the learned trial court overlooked the fundamental distinction in this respect between criminal and civil liability.

In *Queen* v. *Holbrook*, L. R., 3 Q. B. D., 60, 63, Cockburn, *C. J.*, said:

> "You are at liberty to imply from the employment of an agent that whatever he does in the conduct of the business according to law has been sanctioned or authorized; but it is not in my opinion to be inferred that his employer has given him authority to commit a crime, because he has employed him in the conduct of his business"; and on pp. 66-7: "I say nothing of civil responsibility, as that stands upon a totally different footing . . . We deal with penal responsibility, which stands upon a totally different footing, and is governed by a totally different principle."

See also *Reg.* v. *Ramsay*, 48 Law T. Rep., N. S., 733, 744.

In *People* v. *McLaughlin*, 150 N. Y., 365, p. 391, the court said:

> "We find no principle of criminal law which recognizes the relation of principal and agent in the sense in which the term is used in reference to business or commercial transactions. It is true that in civil actions upon contract, the course of dealing between parties may be proved to establish a general

> agency, but that principle has no place in criminal jurisprudence. From such evidence in civil actions, a presumption is raised that the relation shown to exist in other transactions continues, or an estoppel is created, which prevents the principal from denying the agency, and hence is presumptive or conclusive evidence of that fact. No such presumption, or estoppel, arises in a criminal case. There the *presumption is of innocence,* and the doctrine of estoppel has no application."

In *U. S.* v. *Halberstadt,* Gilp., 262, 270, the court quoted from *Parsons* v. *Armor* (3 Pet., 428) that "the general rule is that a principal is bound by the acts of his agent no farther than he authorizes that agent to bind him." This is true even *civiliter,* and the court added:

> "It is very clear that this principle does not reach the case of a suit for a penalty under an act of Congress, or under the circumstances which have been given in evidence in the case in question. If the defendant kept a commission store, the person who purchased and removed the casks was his clerk; and not employed as far as we know from the evidence, to purchase casks or anything else for him, *much less to do so in violation of the act of Congress.* There was no error in the court's instruction that the penalty could not be visited upon the defendant, unless he had some agency in the illegal transaction, or some knowledge of it. The offender against the law was the person who removed the casks, without having the marks and numbers first defaced and obliterated according to the provisions of the act of Congress; *and he must answer for the offence who alone was guilty of it."*

Cited with approval in *McDonald* v. *Hearst,* 95 Fed., 656, 658, 660.

The same principle is laid down in *U. S.* v. *Beaty* Hempstead, 487, 495-6.

> "All the authors that treat of criminal proceedings proceed on the foundation of this distinction that to affect the superior by the act of the deputy, there must be the

command of the superior, which is not found in this case."

Rex v. *Huggins,* 2 Stra., 882, 885.

In *U. S.* v. *Gooding,* 12 Wheat, 460, 469, Gooding had been indicted under the slave trade act. The Government had proved that Gooding was the owner of the vessel and lived in Baltimore, where she was fitted out. Gooding had given authority to one Hill, as master, "to make the fitments for the voyage and paid the bills therefor." Some "equipments were put on board peculiarly adapted for the slave trade," and Gooding had made "declarations that the vessel had been engaged in the slave trade and had made him a good voyage" (p. 468).

The question as to the admissibility of certain declarations made by Hill was certified to this court. The argument for the defendant was that the binding effect of "declarations by known agents is, and ought to be, confined to *civil* cases," p. 469. Story, *J.,* said:

> "In general the *rules of evidence* in civil and criminal cases are the same. . . . It must, indeed, be shown that the agent has the authority and that the act is within its scope." This, it is said, is true on the "familiar principle of criminal jurisprudence, that he who *commands or procures* a crime to be done, if it is done, is guilty of the crime, *and the act is his act.* . . . The proof of the command or procurement may be direct, or indirect, positive or circumstantial; but this is matter for the jury, and not of legal competency."

Plainly, there is no authority in this statement for holding that "command or procurement" is to be inferred, and inferred conclusively, from the mere fact that an agent employed in a lawful employment has exceeded the limits of his lawful authority, and done an act in violation of law.

A statute which makes the crime of A the crime of B, as matter of law, is not "due process of law," for it deprives B of the fundamental principle that

the accused is presumed to be innocent until he is proven, beyond a reasonable doubt, to be guilty.

> The legislature "cannot subvert that fundamental principle of justice which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our state constitutions, and is one of the rules which, in our constitution, are compressed into the brief but significant phrase 'due process of law.'"
>
> *Wynehamer* v. *People,* 13 N. Y., 378, 446.

This court has said since the trial of this case:

> "The presumption of honest intent and right conduct attends the action of carriers as well as it does the actions of *other corporations,* or individuals, in their transactions of life." . . . Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by legislation in respect to carriers."
>
> *Interstate Comm. Com.* v. *Chicago Gt. Western Ry. Co.,* 209 U. S., 108.

In the case of *Le Louis* (2 Dodd., p. 257) the court was urged to sustain measures designed to suppress slave traffic, and it was urged that otherwise it would be "extremely difficult to suppress the traffic" (p. 256). Lord Stowell replied:

> "But the difficulty of the attainment will not legalize measures that are otherwise illegal. To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment . . . is as little consonant to private morality as to public justice."

In *Cummings* v. *Missouri,* 4 Wall., 277, 328, this court, in holding unconstitutional certain clauses in the constitution of the State of Missouri, said:

> "These clauses in question subvert the "presumptions of innocence, and alter the "rules of evidence which, heretofore, under

> "the universally recognized principles of the "common law, have been supposed to be "*fundamental* and *unchangeable.* They as- "sume that the parties are guilty; they call "upon the patries to establish their inno- "cence."

In *Davis* v. *U. S.*, 160 U. S., 469, in speaking of the plea of not guilty, the court said:

> "Upon that plea the accused may stand, shielded by the presumption of innocence, until it appears that he is guilty."

The Elkins Act, as construed by the trial court, is more radical even than the clauses condemned in the *Cummings* case, for under that construction of the Act there is not only nothing left of the presumption of innocence, but in place of it is erected a conclusive presumption of guilt.

In *Mugler* v. *Kansas,* 123 U. S., 623, p. 674, it is evident that this court thought that if the legislation did "deprive him (plaintiff-in-error) of the "presumption that he was innocent of any violation "of law," it would have been invalid.

Cooley in his work on Constitutional Limitations (7th Ed., 1903, p. 436), points out that persons accused of crime are surrounded by "certain safeguards . . . which the government *cannot dispense with,"* and among those it has been held is the safeguard "that the charge must go before the jury, and the guilt of the accused proved to them, *with the presumption of innocence until this is done."*

See also *State* v. *Divine,* 98 N. C., 778.

In that case the court held that while the legislature might raise a presumption of negligence on the part of a railway company from the fact of killing of cattle "in a civil suit for reparation," yet legislation which raised that presumption as a basis for criminal liability of an officer of the company, deprived him of the presumption of innocence and was invalid.

In *Sullivan* v. *County of Oneida,* 61 Ill., 242, 249, in condemning a certain ordinance which destroyed the presumption of innocence, the court said:

> "Thus, the rule is reversed, that no man can be required to explain until sufficient proof is offered to warrant a just and reasonable conclusion against him. *It is no excuse that there was a trial in this case.*"

In *Clark & Marshall's* Law of Crimes (2d Ed.), § 194 (h), p. 267, it is said, after stating two different views:

> "Neither of these views is sound. The proper rule is that the manner in which the business is conducted and other circumstances *may* be such as to justify the jury in finding that the principal or master acquiesced in, or authorized the agent's or servant's act, but that in order to convict, there must be some other evidence than mere proof of the relation of principal and agent, or master and servant. *The presumption of innocence is entitled to more weight than the presumption of authority from the mere fact of agency.*"

Even this statement is probably erroneous, for, as has already been shown, there is no presumption of authority *to commit a crime* from the mere fact of agency.

See *Weinberg* v. *State,* 25 Wis., 370.

In *State* v. *B. & O. R. R. Co.,* 15 W. Va., 362, 387, the court considered what must be shown in order to sustain a conviction under an indictment charging a railway corporation with running trains on Sunday. The court said that a ruling which made the act of the defendant's agents sufficient *of itself,* to show guilt in the defendant,

> "would be to disregard the maxim that the accused is always presumed to be innocent."

The court proceeded to show that the mere doing of a criminal act by an agent

> "gives rise to a suspicion in a criminal proceeding against the corporation, which, if corroborated by evidence that similar acts have been done by agents of the corporation

> repeatedly, would be sufficient proof of their approval to justify a conviction."

This furnishes, probably, the true rule.

In *Satterfield* v. *West. Un. Tel. Co.*, 23 Ill. App., 446, the action was brought to recover a penalty for cutting trees. The court said:

> "The liability arising from master and servant is founded in policy, but the implication of authority in the servant that would render the master liable in many cases in a civil suit, would not be sufficient to convict him in a criminal or penal prosecution."

The Supreme Court of Massachusetts has recognized the same principle. In *Commonwealth* v. *Briant*, 142 Mass., 463, 464, the court pointed out that to hold that the facts that a man employs a servant to conduct a business expressly authorized by statute and that the servant, in the *course* of the business, violates a penal provision of the statute

> "do not necessarily overcome the presumption of innocence, merely because the business . . . *may be carried beyond the statutory limits*" (citing cases).

In *Commonwealth* v. *Putnam*, 4 Gray, 16, the court had instructed the jury that they might find defendant guilty if the sale of liquor was made by one Abraham Putnam while tending store as defendants' agent, "with the knowledge *or* consent of defendant." The court said:

> "We think not. The act, the sale, must be that of the defendant, though done through another. The fact that the person selling was a clerk of the defendant, and that defendant knew of the sale, was not sufficient. He might have had knowledge and dissented, or forbidden it. There must be evidence from which the jury could infer the assent of the defendant."

The decision in *Stockwell* v. *U. S.*, 13 Wall, 531, conflicts in no way with these views. That case, as was said in *McDonald* v. *Hearst*, 95 Fed., 656, p. 659, "was an action of debt." It was held that the

"statute was remedial," and in the opinion of this court it was said:

> "Regarding, then, an action of debt founded upon the act of 1823 as a claim for compensation or indemnity, it cannot be maintained upon authority or principle that the knowledge of the agent that the goods had been illegally imported is not, presumptively, the knowledge of the principal," 13 Wall., p. 547.

The trial court had charged that the action, "being a civil action, and not a criminal prosecution," it was not necessary for the government to prove actual knowledge of the acts constituting the cause of action, and that from the knowledge of the partner who acted for the firm, the jury were "*authorized* to find" that defendants received the shingles knowing of their illegal importation (p. 537). The plaintiffs in error contended that a "*civil action for debt*" would not lie (p. 537). Even in that civil action the court did not instruct as *matter of law* that the act of defendant's partner *compelled* a verdict against defendants. This court pointed out that the charge could not "be said to justify the complaint that the court ruled knowledge of the defendants . . . was *conclusively* presumed from the knowledge of Leman Stockwell, their partner," but only, "that the jury *might* presume "such knowledge from the facts stated" (p. 544). The only contention was that "in the cases of suits "for a penalty" the knowledge of the agent could not be made the knowledge of the principal. The decision that the action was an action of debt, and not for a penalty ended the case, so that, "if there is any general language to be found in the opinion which seems to go beyond this in discussing the liability of a principal for the act of his agent, it must be remembered that it was used with reference to the fact that the action in the case there under consideration was remedial . . .

and not like this, an action for a penalty" (*McDonald* v. *Hearst*, 95 Fed., p. 660).

Of course the case at bar is a criminal action brought by indictment under a statute that is highly and drastically penal. The dissenting opinion by Mr. Justice Field in *Stockwell* v. *U. S.*, "and in all the points taken by it" Mr. Justice Bradley concurred, (568), shows that the difference between the majority and the minority related to the primary question whether the action was for a penalty, under a penal statute, or, for a debt, under a remedial statute.

The rule of *respondeat superior*, it is stated (p. 567) has no application to an action for penalties, which goes not, as already stated, for "compensation or indemnification, but for punishment." In all such cases there must "be personal culpability," and "this principle," it was said, "is of the highest importance, and its conservation is essential to a just administration of the law."

In an earlier part of the opinion, in speaking of the conclusion of a partner's knowledge "from the mere fact of partnership," it had been said that "on the contrary, the *presumption* of innocence which every one may invoke for his protection when accused, repels such conclusions" (p. 563).

In *Schreiber* v. *Sharpless*, 6 Fed., 175, there was a *qui tam* action to recover a penalty imposed by section 4965, Rev. Stat. U. S. The court said:

> "The only question . . . is, can the "defendant be held responsible, under the "statute, for what was done by its agent or "agents, *in pursuance* of their employment, "without its knowledge? . . . The case "of Stockwell *v.* U. S., 13 Wall., 548, draws "a distinction between remedial, or compensating statutes, and *penal* statutes" (italics in the report).

It was held that defendants were not liable.

It is a mistake to say that the forms of law alone constitute "due process." No complete and per-

fect definition of the phrase "due process of law" has yet been given. The most familiar, and one for ordinary purposes sufficiently accurate, is that given by Daniel Webster in the celebrated Dartmouth College case, the *"law of the land,"* being substantially equivalent to "due process of law," as follows:

> "'By law of the land is meant the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only upon trial,'" and we may add from the same source:
>
> 4 Wheat., 581.
>
> "It (the legislature) shall not judge by "*act;* it shall not decide by *act;* it shall not "deprive by *act,* but it shall leave all these "things to be tried and adjudged by the law "of the land."
>
> 4 Wheat., p. 579.

The presumption of innocence is thus a part of the "law of the land"; for to presume guilt, is to condemn before hearing.

Another objection to the Elkins Act as construed below is that it undertakes to determine a question that belongs to the courts.

> "Whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the government."

Birdsong v. *Brooks,* 7 Ga., 88, 92, cited in 2 Wigm. Evid. § 1353, n. 2:

A statute which makes fact A conclusive proof of fact B, is invalid when proof of fact B is necessary to a given finding, as, for instance, the guilt of the defendant. Such a statute, in the last analysis, deals not with a rule of evidence, but with substantive law. The judicial function of applying the law, involves, necessarily, the investigation of the facts, and "to forbid investigation is to forbid "the exercise of an indestructible judicial func-"tion"; 2 Wigmore Evid., § 1353, p. 1666.

Even in a civil action, it has been said:

> "If any question of fact or liability be "conclusively presumed against him, this is "not due process of law."
>
> *Zeigler* v. *S. & N. Ala. R. R. Co.*, 58 Ala., 594.

So, also, it has been said:

> "Those terms 'law of the land' do not "mean merely an Act of the General As- "sembly. If they did, every restriction upon "the legislative authority would be at once "abrogated. For what more can the citizen "suffer, than to be . . . deprived of "his property, his liberty and his life *without "crime?"*

Per Ruffin, *C. J.*, in *Hoke* v. *Henderson*, 4 Dev. Law, 1, 15.

It has been held almost without exception that a statute which "creates a conclusive presumption" as to a matter of fact is void.

> *Bielenberg* v. *Montana U. Ry. Co.*, 8 Mont., 271, 277.

There is no doubt, that the Act includes all carriers, individuals as well as corporations. It applies to "any corporation, or any person or persons" and to "every person, *or* corporation."

Thus, the Elkins Act, so far as it deprives individual carriers of the right to the presumption of innocence, is invalid.

The questions remain: Would this clause of the Elkins Act have been valid, if limited to corporations, and, if so, can this court read into the act an exception of a class constitutionally exempted so as to save what remains?

If Congress had attempted to enact, in terms, that corporate carriers should be deprived of the presumption of innocence, but that the presumption should remain in case of individual carriers, how could the law be sustained? It has been seen already that such legislation would be void, because

of its denial to corporations of the right to the presumption of innocence. But, in another view, also, such a statute would be void. In *Gulf, Cal. & S. Fé Ry. Co.* v. *Ellis,* 150 U. S., 150, this court said, speaking of railway corporations:

> "They do not enter the courts upon equal terms. They do not stand equal before the law. They do not receive its *equal* protection."

In *Seaboard Air Line* v. *Seegers,* 207 U. S., 73 77, the court, in sustaining the act, said:

> "It is not an act levelled against corporations alone, but includes all common carriers."

In *Cotting* v. *Kansas City Stock Yards,* 183 U. S., 79, 108, this court quoted with approval the following:

> "Equal protection of the laws means "equal exemption with others of the same "class from all charges and burdens of every "kind."

and followed it by a quotation from *Cooley's Const. Limitations* to the effect that a statute which singles out one or some from all similar cases would violate a "maxim in constitutional law," and added:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that *equality of rights* which is the foundation of free government" (p. 107).

See also *Boyd* v. *U. S.,* 116 U. S., 616, 635.

It is possible that individuals who are carrying on interstate commerce as partners in one part of the country might, in another part of the country, incorporate themselves for the purpose of carrying on there the same kind of business. It is possible, also, that an agent of the partnership and an agent of the corporation might be alike guilty of the offence of giving a rebate. Indeed, the partnership and the corporation might act through the same

agent. If, in the one case, the members of the partnership, and, in the other case, the corporation should be indicted and charged with the crime of giving rebates, what would the law require before the partners could be found guilty? First, the presumption of innocence would require proof of actual complicity. Some proof would be required beyond mere proof of the individual act of the agent. The question of the *quantum* of *proof* to be required would be a judicial question.

Is there any difference in the rules of law to be applied in the two cases, and, if so, what is the reason of the difference? The only difference which has been suggested is that when the carrier is a corporation, the law dispenses with proof of authority in the agent to commit the crime, that is to say, the law dispenses with proof of guilt. This, however, is only another way of saying that in trying a corporate carrier the law dispenses with the fundamental principle of the presumption of innocence and substitutes the presumption of guilt. In other words, it is more desirable to convict a particular corporation engaged as a carrier in interstate commerce and to do so if need be without proof, than it is to maintain inviolate one of the great principles of our constitutional law.

Classification based upon the dangerous character of the business is constitutional, but classification based merely on the character of the employer is not.

L. & N. R. R. Co. v. *R. R. Comm. of Tenn.*, 19 Fed., 679.

Bedford Quarries v. *Bough*, 168 Ind., 671.

Ballard v. *Oil Co.*, 81 Miss., 507.

Niagara Ins. Co. v. *Cornell*, 110 Fed., 816, 825.

"Due process of law and the equal protection of the laws are secured, if the laws oper-

ate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan v. *Missouri*, 152 U. S., 377, 382.

In *Barbier* v. *Connolly Pipe Co.*, 113 U. S., 27, 31, the court said:

"No impediment should be imposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances."

Quoted *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 559.

The power to regulate commerce is subject to all the limitations imposed by the Constitution.

Monongahela Nav. Co. v. *U. S.*, 148 U. S., 312, 337.

The right to engage in interstate commerce, and the right of individuals to incorporate themselves and carry on as a corporation a business which formerly they carried on as individuals are not rights which Congress can deny, or abridge. It is true Congress may regulate interstate commerce, but its right to regulate depends on the nature of the business, not on the nature of the agency by which citizens may exercise their right to carry on the business. Congress has no warrant of authority to say to citizens who are carrying on interstate commerce to-day, as individuals, that if, to-morrow, they shall exercise their undoubted right to incorporate themselves, they shall thereafter, carry on the same business only on condition that in case they shall be indicted because of an alleged violation of a federal statute based on an unlawful act of some agent to whom they had given authority only to do a lawful act, they shall, upon their trial, be deprived of the presumption of innocence, while their competitors who have not incorporated themselves, shall enjoy the protection of that presumption.

Upon what principle can five citizens, who choose

to incorporate their business, be subjected by Congress to different liabilities and different restrictions from those to which they would have been subject had they done the same business, under the same conditions as individuals?

In *Seaboard Air Line* v. *Seegers*, 207 U. S., 73-77, the court said of the statute then under review:

> "It is not an act levelled against corporations alone, but includes all common carriers."

In *Connelly* v. *Union Pipe Co.*, 184 U. S., 562, the court in distinguishing cases relating to the power of taxation in which it had been held that the constitution was "not violated by special legislation "applied equally to artificial bodies," said:

> "But a different consideration controls when a state, by legislation, seeks to regulate the enjoyment of rights, and the pursuit of callings connected with domestic trade."

The Act of 1887, Sec. 10, Congress, contained the provision:

> "Whenever such common carrier is a *corporation,* any officer or agent thereof who shall knowingly and wilfully assist, or who shall willingly permit any person to obtain transportation for property at less than the regular rates" shall be guilty of a misdemeanor.

It was not until 1903 that Congress threw aside all restraint and attempted, if the learned trial court be right, to punish the innocent and the guilty alike.

The question remains: Will this Court read into the act an exception of a class constitutionally exempt, in order to save what remains?

In the *Employers' Liability cases,* 207 U. S., p. 497, the court said:

> "From the first section it is certain that the Act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion."

The court added:

> "It regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce."

The court pointed out (p. 498) that the liability of the carrier was declared to be in favor of "any of its employees."

The ruling was that as the act included subjects beyond the power of Congress, the act was void unless there was "merit in the propositions advanced to show that the statute may be saved" (p. 499).

"Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional," but this may be done "only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated" (p. 501), and the court will not attempt to save a statute by making it "only partial in its operation" (p. 502).

The Elkins Act can be confined to corporate carriers only by inserting the words of limitation so as to make the words "any carrier" apply only to "any carrier corporation," or "any carrier being a corporation."

In *U. S.* v. *Reese*, 92 U. S., 214, the court said:

> "The question then, to be determined is whether we can introduce words of limitation into a *penal* statute, so as to make it specific, when, as expressed, it is general only. It certainly would be dangerous if the legislature could set a trap large enough to

> catch all possible offenders, and leave it to the courts to step inside, and say who could be rightly detained and who could be set at large. This would, to some extent, substitute the judicial for the legislature department of the government."
>
> See also *U. S.* v. *Harris,* 106 U. S., 629.

In *U. S.* v. *Ju Joy,* 198 U. S., 253, 262, the court said:

> "An exception of a class constitutionally exempted cannot be read into those general words, merely for the purpose of saving what remains."
>
> See also *Ill. Cent. R. R. Co.* v. *McKendree,* 203 U. S., 514.

To the same effect are:

Baldwin v. *Franks,* 120 U. S., 678, 685-690.

Poindexter v. *Greenhow,* 114 *Id.,* 270, 304.

Trade Mark Cases, 100 *Id.,* 82.

Allen v. *Louisiana,* 103 *Id.,* 142.

Sprague v. *Thompson,* 118 *Id.,* 90.

Pollock v. *Farmers' Loan & Trust Co.,* 158 *Id.,* 636.

This renders unnecessary any discussion of the decision in *Diamond Glue Co.* v. *U. S. Glue Co.,* 187 U. S., 611. The statute was not a penal statute, and the objectionable part had been repealed before the completion of the work covered by the contract in suit.

Suggestion of a Construction Which Will Save the Statute from the Objection of Unconstitutionality.

Congress was legislating for all carriers, individuals as well as corporations. The first ques-

tion is whether the language of the statute com*pels* the conclusion that Congress intended to make the crime act of "any . . . agent" of every carrier, individual or corporate, the crime of the carrier. It would have been quite easy to insert in the statute the words "whether authorized or not by such carrier," and if Congress had the intention to attempt to destroy a fundamental principal of our jurisprudence, would it not have been quite natural to use express language rather than to leave so momentous a change to mere implication? We have seen, however, that the statute applies to "*any* carrier" so, we must attribute to Congress the intention to apply the same rule to individuals as well as to corporations. Indeed, the statute refers several times to "persons," or "corporations," or "companies." If, therefore, we can construe the statute so as to avoid making an individual carrier liable criminally for the act of his servant, whether authorized or not, must we not avoid also construing the same language so as to impose such a liability upon corporate carriers?

If, furthermore, we find that the construction which the trial court gave to the statute makes it of doubtful validity as applied to individual carriers, we have another reason for refusing to attribute such an intention to Congress. If, finally, such a construction of the statute is plainly unconstitutional as applied to individual carriers, then, inasmuch as the statute makes no distinction betewen individual and corporate carriers, we cannot escape the conclusion that the statute is void, even if we assume that Congress might lawfully make the crime of an agent the crime of the corporation, unless we can construe the language differently from the court below. We

avoid this conclusion, however, by giving to the language the natural interpretation which makes it consistent not only with the fundamental principles of criminal law, but with the demands of justice. May we not doubt whether a suggestion to pass, in terms, so startling a statute as this has been construed to be, would have met with the approval of Congress, even in times such as those through which we have recently passed?

In other words, when Congress undertook to make *any* common carrier, individual or corporate, liable criminally for *any* act of *any* agent within the scope of the agent's employment, it did not mean whether actually authorized or not, but did mean, provided the act be in fact authorized by the carrier, whether individual or corporation.

The indictment itself proceeds upon the assumption that *some* proof of authority is requisite to show guilt. The charge is that the plaintiff in error and "its agents . . . Nathan Guilford and Fred L. Pomeroy, acting within the scope of their *authority* as Traffic Manager and Assistant Traffic Manager, respectively of the said railroad company did enter into an *unlawful* agreement and arrangement" (fol. 10). Substantially the same charge is made as to the payment of the alleged rebates (fol. 12).

The construction of the statute adopted by the court below is not necessary to the enforcement of the prohibition of rebates. The agent that gives a rebate to-day is punishable by imprisonment and might have been made punishable by imprisonment by any former statute. It is on the guilty individual that punishment must fall if punishment is to deter others.

> "It cannot be permissible to give any other construction which would violate the elementary rules of criminal responsibility."
>
> *People* v. *Parks,* 49 Mich., 333.

In *Massey* v. *Morris* (1894), 2 Q. B., 412, the conviction of a master for overloading his ship was reversed, because, as the court held, "the mere "fact that he appointed the master who allowed it "to be done" was not enough to show an "allowing" of it by the owner himself.

Cave, *J.*, said: "I do not think that that could possibly have been the intention of the legislature."

No statute should be construed to be radically in derogation of the common law if such construction can reasonably be avoided.

In *Hall* v. *N. & W. Ry. Co.*, 44 W. Va., 36, the action was to recover a penalty of five hundred dollars for an overcharge made by a conductor. The court said:

> "I take it that the legislature did not intend to punish the corporation, if innocent, with such severe penalties. I can readily see that it is just and good policy to thus punish a railroad company for such a wrong, if done by its authority, or with its approval; but we ought not to give that liberality of construction to the statute which imposes such injustice, because it is a highly penal statute, and its words do not make the company liable for unauthorized acts of agents, *nor does reason or justice call for it.*"

THIRD.

The indictment is bad for the misjoinder as defendants of the plaintiff-in-error and its agents.

> "Misjoinder of defendants may be made the subject of a demurrer, motion in arrest

> of judgment, or writ of error; or the court will in general quash the indictment."
>
> *Archbold's* Cr. Pl. (22nd Ed.), 78.

Wharton states the rule in substantially the same language, but adds:

> "When the misjoinder appears in evidence an acquittal may be ordered."
>
> *Whart.* Cr. Pl. & Pr. (9th Ed.), 307.

In the case at bar this objection was made the subject of demurrer (pp. 28, 32) motions to quash (pp. 42-44) motion to direct an acquittal (p. 68), motion for a new trial (p. 84), in arrest of judgment (p. 98) and the writ of error (8th, 9th, 22nd to 34th and 61st Assignments of error; pp. 101, 102-103, 106).

The offence charged in the indictment herein did not arise wholly or in part from the joint acts of all the defendants, but solely from the personal and particular acts of the plaintiff-in-error's agent Pomeroy. The evidence failed to show any act by Guilford.

The language of the indictment is that "the New York Central & Hudson River Railroad Company, its agents, Nathan Guilford and Fred L. Pomeroy, acting within the scope of their *authority* as traffic manager and assistant traffic manager, respectively, of the said railroad company" entered into the alleged unlawful arrangement of April 26, 1904, (pp. 7, 23), and that the alleged rebates were paid by the plaintiff-in-error *and* Messrs. Guilford and Pomeroy "as agents and acting on behalf of said company within the scope of their employment" (pp. 10, 14, 18, 22, 26, 27).

But a corporation does not act *with*, but *by*, its agents. To say that it acts *with* them is to say what is as impossible in law as it is in fact.

The excuse for this apparently repugnant alle-

gation of joint action on the part of the plaintiff-in-error and its agents, is supposed to be found in the fourth clause of the Elkins Act.

According to the interpretation placed upon it by the Government, the effect of that clause is to render a common carrier, corporate or individual, *ipso facto* guilty with its agent of a joint crime, whenever the latter, acting within the scope of his employment, does or omits any act in violation of the statute, and this whether or not the agent's dereliction was authorized by or known to the carrier, and, indeed, even though expressly forbidden.

The carrier, however innocent he, or it, may be in fact, is, because and by reason of his agent's offense, and solely for that reason, to be "deemed" the latter's criminal accomplice, and jointly indictable with him.

The indictment in the case at bar would have been less objectionable in form if, after setting forth the employment of Guilford and Pomeroy by the plaintiff in error and that the alleged rebates were given by the latter acting within the scope of their employment, it had concluded with the averment:

> "Whereby, and by force of the statute in such case made and provided, the unlawful acts of the said Nathan Guilford and Fred L. Pomeroy hereinabove alleged are also deemed to be the acts of the said New York Central and Hudson River Railroad Company as well as of the said Nathan Guilford and Fred L. Pomeroy."

But it is nevertheless, perfectly apparent that it was framed upon this theory, which was indeed the fundamental theory of the prosecution.

Two questions are thus presented: (1) Does the Elkins Act permit the joinder of defendants in the

manner attempted in this indictment? and (2) If it does, is the act to that extent constitutional?

(1) The Elkins Act does not permit the joinder of defendants in the manner attempted in this indictment.

We will assume for the purpose of the argument that the offense charged in the indictment consists in the act alone, without regard to the particular object with which it was done, or the motive which inspired it, or, in other words, that it falls within the class of crimes where "purposely doing a thing prohibited by statute may amount to an offence, although the act does not involve turpitude or moral wrong" (*Armour Packing Co.* v. *United States,* 209 U. S., 56), and that it is therefore competent for Congress to attribute an offense of this character to a corporation, when committed by its authority, since it may be committed entirely through the company's agents.

The very fact, however, that the offense is, and necessarily must be, committed *entirely* through the company's agents and without any actual participation on its part, at once precludes the idea of a joint indictment against the corporation and the agents who have done what is sought to be imputed to the corporation, for it is an elementary rule of criminal pleadings, that in order to justify a joinder of defendants the offense charged must arise *wholly* from the *joint* act of *all* the defendants.

So far from this being the case, the situation is the very reverse when a corporation is proceeded against by indictment. Being a "mere abstraction," "an artificial being, invisible, intangible and existing only in contemplation of law" (*Hale* v. *Henkel,* 201 U. S., 43, at p. 78), and "simply an instrumentality by which the powers granted"

to its members composing it may exercised (*Id.*, at p. 85) its criminality necessarily arises *wholly* from the act or acts of its agents. It never acts *with* the latter. It can only act *by* or *through* them. When they act it acts. Unless they act it does nothing. Its guilt is purely constructive and theoretical, and is attributed or imputed, not because the corporation has itself done anything, but because its agents have done something for which, from supposed motives of public policy the fictitious being *called* a corporation is "deemed" criminally accountable.

(*a*) The fundamental error underlying the theory of this indictment arises from a confusion of the relations existing between a corporation and the human beings by which it acts, and the relations existing between an individual principal and his agent.

That a principal cannot be held liable for a crime committed by his agent unless the crime arises, in fact, from the *joint act* of the principal *and* the agent is a part of the very alphabet of our criminal jurisprudence.

A human being who is a principal or master is *prima facie* criminally liable for the illegal acts of an agent or servant done in a general course of an *illegal* business authorized by the principal.

Wharton's Cr. L. (10th Ed.), § 247.

But if in the course of the principal's or master's *lawful* business, the agent or servant commits a crime, the master is not liable, unless, by some act or omission of his own, distinct from that of the servant, he *in fact joins with the agent* in the commission of the crime.

Where this element does not exist, the rule is clearly established that in the criminal law the

principal is not answerable, as he is in civil jurisprudence, for the act of his servant or agent.

Were it otherwise, the master would be punishable for a crime to which he was not personally a party or privy, or in other words, on account of a wrong committed by another, which is contrary to the natural sense of justice.

Nathaniel Lindley, 2 Juridical Soc. Papers, 31.

Morawetz Priv. Corp., Secs. 732, 733.

> "When the principal is held responsible he is not vicariously suffering, but suffering for *his own act.*"
>
> *People* v. *Clark,* 8 N. Y. C. R., 179, 215.

In other words, the act of the master which renders him amenable to criminal discipline is a separate and distinct act from that of the servant. The servant is punishable because he has done something unlawful. The master is punishable because he has done something *else* unlawful in causing or authorizing his servant to commit the act.

(*b*) There is no such situation in the case of a corporation. When a corporate officer, director or employee does a wrongful act in the prosecution of the company's business, the act is never in fact that of the corporation, but is always that of its agent, separate and apart from which the corporation does nothing.

There are not two wrongs—one by the corporation, and the other by its agent—but one sole indivisible wrong, committed in fact by one or more human beings, although such wrong may be, under

some circumstances, imputed, by a fiction of law, to the corporation.

Whereas the individual master is punishable only when he has become a party to his servant's offense by his own wrongful act or culpable negligence, in the case of the corporation which is incapable of either, its agent's act is, by a legal fiction, held to be its own, to the same extent as though it were the agent and not the principle. It is, in short, punishable not for its own act, but for that of its agent; not because it has committed or authorized it, but because public policy requires a different rule to be applied to the mythical corporate "principal" to that governing the criminal liability of an individual employer.

An indictment against a corporation, though in form directed against a so-called "*legal* entity," is always based wholly upon an act or acts committed by one or more human beings.

If a corporation and *one* of its agents can be joined as defendants in a criminal prosecution, it follows that a joint prosecution would lie against a corporation and *all* of its agents. There is no doubt that the latter are always answerable for their acts by criminal proceedings (*R.* v. *Great N. Co.*, L. R., 9; Q. B. 315). Assuming their indictment and conviction and sentence, and the consequent punishment of every human being who had any culpable connection with the transaction, can further punishment for the same acts be visited upon the abstraction that really took no part in it?

To do so would result not only in the punishment of a mythical thing for a crime which it had not committed, but in the double punishment of the same acts. Conceding the power of Congress to impute offenses of this character to corporations, is

it to be supposed that it intended, in such cases, to punish the same acts twice?

(*c*) But the Act makes no distinction between corporate and private carriers. If it permits corporations as well as the agents to be punished for the same acts, it subjects partnerships and individuals engaged in business as interstate carriers to the same rule. They become the criminal confederates of their agents the moment one of the latter does, or omits to do an act, in violation of the statute, even though without their consent or knowledge, and are thus made punishable on account of wrongs wholly committed by other persons. Public policy may demand this sort of vicarious punishment in the case of statutory offenses committed "within the sphere of corporate capacity" (*Bishop's New Cr. L.*, § 417 [2]). To extend it further so as to punish an innocent *individual* master would certainly shock one's sense of justice. If in the case of a corporation, the real offender happens to be a stockholder, his offense, according to the view taken by the learned trial Judge, renders him liable to punishment twice, for after being fined himself he must also contribute with his fellow stockholders toward the payment of the fine imposed upon the corporation.

It will be assumed that Congress did not intend to establish a doctrine so entirely at variance with the spirit of our fundamental law.

(*d*) But the true construction of the provision is not difficult.

The courts had repeatedly decided long before the passage of the Interstate Commerce Act that the commission of wrongs, wherein the intention is "notional and constructive rather than real," by the

proceedings of corporate agents, rendered the corporation as well as the agents amenable to the criminal law. But no court had decided, nor had it ever been suggested that both the corporation and its agents could be punished for the same offense, either jointly or in distince proceedings. The original Interstate Commerce Law had made individuals alone criminally liable for the offenses therein defined and made punishable. The object of the Elkins Act was to make the corporation liable, as well as the individuals, or in other words, to give the Government a choice of criminal remedies, so that it might, in a given case, proceed against the individuals or the corporation, according to the supposed advantage of one course or the other.

If it had intended to do more than this, the original Interstate Commerce Act well illustrates how it might have accomplished its purpose. Section 10 of that Act after prescribing a penalty of fine and imprisonment for *individuals* guilty of inducing, aiding or abetting *unjust discrimination* on the part of any person, corporation or company, provided that *"such person, corporation, or company shall also,* together with *said common carrier,* be liable, *jointly or severally,* in an *action on the case* to be brought by any consignor or consignee discriminated against, in any court of the United States of competent jurisdiction, for all *damages* caused by or resulting therefrom."

If the framers of the Elkins Act had intended to originate of system of *joint criminal liability,* it is inconceivable that they would have used language less clear than they deemed necessary to create a joint liability for *civil damages.*

It is believed that there is no direct decision on

the point, the only case touching it being *MacAndrews & Forbes Co.* v. *United States,* 149 Fed. Rep., 823. Of that case it is enough to say that the learned District Judge who decided it based his ruling entirely upon the paradoxial assumption (p. 832), that "there is nothing inherently impossible in the corporation doing one thing and the individuals another at or about the same time."

Thompson (Corp., § 4495) bases his statement (Sec. 4995) that "the corporation may be proceeded against jointly with the wrongdoing officer or agent" solely on the case of *People* v. *White Lead Works,* 82 Mich., 471. An examination of the reports will show that the point of *joint* indictability was not considered or raised in that case, or in *Overland Cotton Mill* v. *People,* 32 Col. 263, which may be cited as a *precedent.*

In order to sustain a joint indictment based on the act of Pomeroy, it is necessary, first, to impute his act, by one fiction to the corporation, because it can act only by an agent, and then, by another fiction, to assume some action by the corporation which it has just been assumed *can not* act of itself.

(b) If the Elkins Act permits the joinder under consideration it is to that extent unconstitutional.

The provision under consideration as construed by the court below makes every common carrier criminally liable for every act of its agent, or employee, done within the scope of his authority. If it authorizes the joinder of individual carriers as defendants in indictments found against their offending agents and employees, merely upon proof of the acts of the latter, it is unconstitutional for the reasons already pointed out.

But it also authorizes the joinder as defendants of corporate carriers and their stockholders whenever the latter, being directors or agents, have

violated the statute. The directors of the plaintiff-in-error, as of all New York corporations, must be stockholders. Could the plaintiff-in-error and its board of directors, or any one or more of them, be properly joined as defendants in an indictment for a violation of the Elkins Law? If the court below was right in its view of that statute they could be.

A construction of the statute which would point such an indictment would flagrantly violate fundamental law.

Assume the joint indictment of the plaintiff-in-error and its directors upon an allegation that the latter omitted to file a tariff, whereby the corporation, as well as the directors, were to be deemed guilty of a violation of the statute. Plainly the conviction or acquittal of the corporation would bar a prosecution of the directors, and *vice versa*. If so, there can be no warrant in law for their joint indictment.

Take the case of a corporation composed of three stockholders, who also compose its board of directors, one being the president, another the secretary, the third the treasurer. The three are jointly indicted for acts committed in the conduct of the corporate business. After their conviction or acquittal, can the mere "abstraction," which exists only in contemplation of law, the "artificial, invisible and intangible" *instrumentality* by which these individuals did the wrong, be subsequently prosecuted for the same thing?

The authorities hold that the conviction or acquittal of either would bar a subsequent prosecution of the other.

In *U. S.* v. *McKee,* 4 Dillon, 128, which is cited with approval by this court in *Goffey* v. *U. S.,* 116

U. S., 436, 445, the defendant was indicted, convicted and punished under Section 5440 of the Revised Statutes for conspiring with certain distillers to defraud the Government out of taxes due on whiskey distilled by the several parties mentioned. The indictment alleged that pursuant to the conspiracy other parties, who were the defendants' co-conspirators, unlawfully removed the whiskey from the distillers. The Government subsequently brought a civil action against the defendant to recover the liability denounced by Section 3296 of double the amount of taxes of which the Government had been defrauded by the unlawful removal of the whiskey; and the petition charged in the language of the statute, that in such removals the defendant aided and abetted. The defendant's answer set up two defences: First, his conviction, and, second, a pardon by the President. In overruling a demurrer to the answer, the court said (per Miller, *C. J.*, Dillon, *J.*, concurring):

> "In determining the sufficiency of both these defenses, it is necessary to ascertain clearly the nature of the offense charged in the indictment for which the defendant has been punished; for if it is the same offense, as defined by law, for which he is now prosecuted, and is also for the same transactions, our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor. . . . We are all of opinion that his joining the conspiracy, of which the purpose was to remove the whiskey, was aiding and abetting the removal which was affected by the means of that conspiracy. . . . We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action; and we are also of opinion that the allegations of the answer are sufficient averments that they are the same."

In *United States* v. *One Distillery*, 43 Fed. Rep., 846, it was held that a proceeding to forfeit the property of a corporation based upon the alleged fraud of an officer of the corporation would not lie after the conviction and sentence of the officer upon an indictment predicated upon the same fraud. The court, after reciting the grounds of the decision in the *McKee* case (*supra*), said:

> "The decision was based upon the averments that both proceedings were for *the same acts or transactions.* If the government cannot be permitted to maintain a civil action for the recovery of money denounced as a penalty for a violation of one of the sections of the statute where the same party had been previously prosecuted and convicted and punished for the same acts or transactions under another section, it would seem to me, for the same reasons, to follow necessarily that the government cannot be permitted to maintain a civil action for the forfeiture of the property of a person for the acts or transactions for which it has previously prosecuted, convicted and punished him. The right which the government by this suit asks the Court to enforce is the right which vested in it in 1887 to take the property as forfeited by the fraudulent acts on the part of the Fruitvale Wine & Fruit Company (*U. S.* v. *Stowell*, 133 U. S., 1). When that right accrued, Young, as an owner of stock in that corporation, had an interest in every part and parcel of the property of the company. The government had the right to proceed by civil action to enforce the forfeiture of the property because of the frauds, or to prosecute the parties engaged in it criminally; but for the same acts it could not do both, according to the ruling in the cases to which reference has been made. It does not seem to me to be material that Young (the officer who had been convicted) does not here appear as a claimant. If the facts be as alleged, and upon the demurrer, they are to be taken as true, the government indicted, convicted and punished

him for certain frauds committed in relation to the property in question; and for the same fraudulent acts and omissions that were introduced in proof in support of that indictment it asks the Court in the present suit to decree a forfeiture of the property, the right to which accrued to the government as has been seen, at the time of the commission of the frauds, and when Young, as a stockholder in the corporation, was interested in every part and parcel of the property. *To take the property in which he has an interest is to take his property; and, for the same acts and omissions, to punish him criminally and also take his property, is for the same offenses to punish him twice.* The circumstance that Wolters, Helm, Austin and Kauffman have not been prosecuted for the fraudulent acts and omissions that are made the basis of the present action does not relieve the government's case of the difficulty. *To take the property from one stockholder is to take it from all*, and I can see no valid reason why the plea in bar of the action may not be interposed by any one interested in the property."

This case was carried to the Circuit Court by which the judgment of the District Court was affirmed. This court affirmed the judgment of the Circuit Court upon the sole ground that there was no proof in the case to overcome the denials in the original answer that the seized property had been forfeited, saying, per Harlan, *J.:*

"If the claimants had withdrawn their denials of such allegations of the information as set forth, the grounds upon which the government asserted the forfeiture of the property in question, it would then be necessary to consider whether the conviction of Young precluded the United States from proceeding by information against the property. But the claimants did not take that course. * * * Without considering the

merits of the question raised by the amendment of the answer, we affirm the judgment of the Circuit Court," etc.

United States v. *One Distillery*, 174 U. S., 149, 152.

In *United States* v. *Olsen*, 57 Fed. Rep., 579, 586, N. D. Cal. (Morrow, *D. J.*), the court, without expressing any opinion as to the soundness of the decision in the case of *U. S.* v. *One Distillery*, observed that in the case cited "the proceedings *in rem* implied a retrial of the *same issues between the same parties.*"

That would have been precisely the situation here if it had happened that Messrs. Guilford and Pomeroy were stockholders. If the corporation should be convicted it could only be upon proof that the individuals who compose it violated the statute; and the trial of the individuals would necessarily involve a retrial of *this identical issue.*

The *Olsen case* held that a judgment of forfeiture of a vessel for the act of the master in violating the Act of July 5, 1884, § 2, did not bar an indictment against the *individual* owner of the vessel for aiding and abetting the master in a violation of § 11 of the same act.

This case well illustrates the distinction we have pointed out. An individual owner who aids and abets the master is guilty of a distinct wrong for which he *as well as the master* is criminally liable. A corporate owner cannot act jointly with its agent, and therefore is not guilty of any wrong, in fact, when its agent commits a wrong, notwithstanding his wrong may be, under certain conditions, imputed to it.

The fourth clause of the Elkins Act may give the government the right to proceed criminally in a proper case *either* against the corporation, *or* against the individuals whose acts or omissions are imputable to it; but it cannot

competently authorize it to maintain both proceedings, or a joint proceeding for both, since the result would be to punish twice acts committed by the individuals in fact and imputable to the corporation only by a legal fiction, and in which acts there was, and could be, no *joint* action on the part both of the corporation and the individuals.

If it permits the punishment both of a corporation and of a stockholder therein for the same acts or transactions, it is unconstitutional and void for the further reason that its enforcement in this manner would subject the latter to a different and greater punishment than could lawfully be imposed upon an individual not a stockholder who commits the same acts or is a party to the same transaction.

It is not competent for the Congress to subject one man to a different and more severe punishment for doing a particular thing than could be imposed upon another man for doing the same thing, simply because the former happens to be a stockholder in a corporation on whose behalf or in whose interest the thing was done. This is, however, precisely what may happen if the construction placed upon the statute by the court below is sustained. The theory upon which that construction is based necessarily includes the proposition that where the guilty agent is a stockholder his property can be taken in payment of a fine amerced against the corporation, and he himself be subjected to an additional fine, whereas an agent not a stockholder is liable to the latter penalty alone.

We do not believe that this court will hold that the Congress intended a result so plainly violative of the spirit of the constitution.

FOURTH.

The demurrer should have been sustained and the motions to quash and in arrest of judgment granted, because of the substantial and structural defects of the indictment.

> "By a demurrer the defendant refers it to the court to pronounce whether, admitting the matters of fact alleged against him to be true, they do, in point of law, constitute him guilty of an offense sufficiently charged against him."
>
> *Archbold's* Cr. Pl. (22nd Ed.) 150, citing 1 *Starkie's* Cr. Pl. (2nd Ed.).

The demurrer

> "puts the legality of the whole of the proceedings in issue, as far as they judicially appear."
>
> 1 *Chitty,* Cr. L. (5th Am. Ed.), 440.

And the Court

> "is bound to examine the whole record, to see whether they are warranted in giving judgment upon it."
>
> 1 *Bishop,* Cr. Proc. (3d Ed.) § 741.

Objections to the "substance and structure" of the indictment are reached in this way.

> *Id.,* §775.

They are, of course, equally available by motion to quash and in arrest of judgment.

1. The acts described and set forth in the indictment do not constitute a crime, since it is not averred that by reason of the giving of the alleged rebates, any advantage was given or discrimination practiced.

By the express terms of the Act the giving of rebates, as such, and by this we mean as distinguished from the wilful failure of a carrier strictly to observe its published tariff, constitutes an offense only when thereby property

> "shall by any device whatever be transported at a less rate than that named in the

> tariff * * * or whereby any *other advantage* is given, or *discrimination* is practiced."

Advantage is not given in all cases, nor is any discrimination necessarily practised by merely giving rebates. The shipper who receives them derives no advantage, nor are his competitors thereby discriminated against, if they are awarded to all shippers alike. The use of the word "other" in the statute therefore indicates a plain intention on the part of Congress to limit and confine the application of the phrase which precedes it to cases where, in consequence of the rebate, the transportation "at a less rate," &c., had resulted in some advantage or discrimination.

In this connection the case of *Gridley* v. *Northwestern Life Ins. Co.*, 14 Blatch., 107, is in point. In that case an application for a policy of insurance contained a negative answer to the question whether the relatives of the applicant had been afflicted with "consumption, scrofula, insanity, epilepsy, disease of the heart, or any *other hereditary disease.*" The defendant proved *temporary* insanity on the part of a relative, and contended that a breach of the warranty had been shown. But Benedict, *J.*, said:

> "It may be that the diseases enumerated in the question are not in all cases hereditary, but all of them sometimes take the form of hereditary diseases; and the word *'other,'* to my mind, plainly indicates that the question was intended to be an inquiry whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease."

Unless the word "other" as used in the Elkins Act be given the same restrictive or qualifying effect, the phrase "whereby any such property shall . . . be transported at a less rate than that named in the tariff" adds nothing to the section, for the giving of rebates to all shippers alike, without fa-

vor or discrimination, falls squarely within the prohibition against the non-observance of tariff schedules.

There is no ambiguity in the words. The intention of the legislature is readily to be collected from the language employed. There is, therefore, "no room for construction."

Marshall, *Ch. J.*, in *United States* v. *Wiltberger*, 5 Wheat., 574, 5766.

That the view for which we contend is sound is clear if we examine the statute with reference to the evil it was designed to suppress:

> "We find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which *the unlawful preference* of rebate, concession or discrimination is offered, granted, given or received."
>
> *Armour Packing Co.* v. *United States*, 209 U. S., 56.

This court said in *Wight* v. *U. S.*, 167 U. S., 512:

> "The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give *equal rights* to all shippers over its own road and to forbid it by *any* device to enforce higher charges *against one than another.*"

Followed in

Interstate Comm. v. *Ala. Mid. R'y*, 168 U. S., 144, 166.

Union Pac. R'y Co. v. *Goodridge*, 149 *Id.*, 680.

See also

U. S. v. *Mich. Cent. R. R. Co.*, 122 Fed., 544 (decided since 1903).

The purpose of Sec. 2 (Act 1887), was "the prevention of any *unjust* discrimination between shippers by any form of device."

Judson, § 145, p. 182.

"*Advantage* or *discrimination* thus being an elment of the offense, the failure to allege it nullifies the indictment."

United States vs. *Hanley,* 71 Fed. Rep., 672.

The court below, without passing definitely upon this question, intimated its doubt of the soundness of the ruling in the *Hanley* case, observing:

"If it were necessary to base the decision of this demurrer upon this point, I should hesitate to follow the decision in *United States* vs. *Hanley.* I think that if a railroad company receives from a shipper the full schedule rate, and then repays him a percentage of the amount paid as a rebate, there is weighty ground to hold that it is *presumptively* guilty of illegal discrimination under the act; and that if in fact the railroad company has pursued the *extremely improbable course* of making a uniform reduction of its rates to everybody, while retaining a higher rate on its published schedules, no substantial injustice will be done to any defendant if he is left *to prove that fact as a part of his defense.*" (Record, pp. 31-32).

This is certainly a unique doctrine. This court has said:

"The plea of not guilty is unlike a special plea in a civil action, which, while admitting the case averred, seeks to establish substantive ground of defence by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty."

Davis v. *U. S.,* 160 U. S., 469, 485-6, 490, 493.

We are dealing with a question of pleading and not of evidence. In the case at bar, as in the *Hanley* case, the framers of the indictment

> "appear to have considered that rebates or special rates were of themselves criminal and could by appropriate averment be made the substance of every offense defined in the interstate commerce act" (71 Fed. Rep., at p. 673).

The great purpose of the Elkins Act, however, as well as that of the statute it amended, was

> "to destroy *favoritism* and to secure *equality of rates* to all."
>
> *Armour Packing Co.* vs. *United States,* 153 Fed. Rep., 1, 20.

Congress, therefore, while prohibiting any wilful failure of common carriers strictly to observe its duly filed and published tariffs, forbade the giving of rebates, only when thereby "advantage is given or discrimination is practiced."

If this be true, and that ingredient of the offense is not charged, the indictment must be bad, for it is elementary law that every fact

> "which is an element in a *prima facie* case of guilt must be stated; otherwise there will be at least one thing, which the accused person is entitled to know, whereof he is not informed."
>
> *1 Bish. Cr. Proc.,* Sec. 519.
>
> "Offenses created by statute, as well as offenses at common law, consist, with rare exceptions, of more than one ingredient; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleadings will be held bad on demurrer."
>
> *United States* vs. *Mann,* 95 U. S., 583.

Assuming, but by no means admitting, that proof upon the trial of the facts set forth in the indictment would *presumptively establish* illegal discrimination if such discrimination were alleged,

and therefore, put the defendant upon its defense, the difficulty is that no discrimination is *alleged*.

The offense of selling intoxicating liquor without a license is presumptively made out by proof of its sale, and the courts have held from time immemorial that no injustice is done to the defendant if he is left to prove as a part of his defense that he had a license; but no one would seriously contend that in such a case the indictment would be good if it merely charged a sale, without an averment that the defendant had no license.

Proof of the possesion of a forged instrument is presumptive evidence that the person in whose possession it is found not only knows it to be false, but intends fraudulently to utter it; but no court would uphold an indictment in such a case which did not allege guilty knowledge and an intent as well to utter as to defraud.

Proof of the possession of stolen property establishes, *prima facie*, the receiver's guilty knowledge that the property was stolen, but this does not dispense with the necessity of an allegation to that effect in the indictment.

The extent to which this principle has been carried is well illustrated by the decision in *Blitz* vs. *United States*, 153 U. S., 308, 313, where the defendant was charged with having knowingly personated and voted in the name of another at a Congressional election.

The court held that since judicial notice would be taken of the fact that state officers were also voted upon at the election, the count was fatally defective in failing to charge *"except by inference"* that the defendant in fact voted for a representative in Congress.

In *United States* vs. *Taylor*, 57 Fed. Rep., 391, the court said (at p. 392):

> "It is hornbook law that in indictments for a large class of offenses a *scienter* must be

> charged. In an indictment for uttering forged paper, for instance, it is not sufficient to charge that the paper was forged, and that it was uttered by the accused; but it must be distinctly, and in express words, charged that the accused well knew the paper was a forgery when he passed it upon another person. This knowledge, this *scienter, cannot be supplied by inference or implication from other allegations of the indictment.*"

This is precisely what the Supreme Court decided in *United States* vs. *Carll,* 105 U. S., 611. In that case the indictment which was framed upon a statute which did not in terms include the element of guilty knowledge in its description of the offense, averred that the defendant

> "feloniously, and with intent to defraud . . . did pass, utter and publish . . . a falsely made, forged, counterfeited and altered obligation and security of the United States."

Although these averments *necessarily implied* that the defendant *knew* the instrument to be forged at the time he uttered it, there was no direct or express allegation to that effect. This court held that because of this omission the indictment charged no crime.

We submit that this indictment cannot be upheld as charging the offense of giving of *unlawful rebates,* as that offense was defined by the Elkins Act, since there is no allegation of *advantage* or *discrimination.*

2. Nor does the indictment charge any other violation, either of the Elkins Act, or the Interstate Commerce Act.

It is clear from the language of the charging part of the indictment that the accusation upon which the Grand Jury intended the defendant to be tried was that of giving rebates, and nothing

else. It may be that some other charge should have been made, or that the Grand Jury would have made it in another form if their attention had been called to the difficulties of the situation; but, however this may be, the defendant cannot be tried upon any such supposition.

> "The party can only be tried upon the indictment as found by such Grand Jury and especially upon *all its language found in charging part of that indictment.* * * * If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a Grand Jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no man shall be held to answer,' may be frittered away until its value is almost destroyed."
>
> *Ex parte Bain,* 121 U. S., 1, 10.

But if it were permitted to treat the indictment as charging something different from that which the Grand Jury intended to charge, the matters which are alleged constitute no violation of any of the provisions of the Elkins Act other than those dealing with unlawful rebates, or of any of the provisions of the Interstate Commerce Law.

(*a*) *The indictment does not allege any wilful failure on the part of the defendant strictly to observe the tariffs filed and published as required by law.*

The *wilful* failure of a carrier, strictly to observe the tariff rates, was a misdemeanor under the Elkins Act, and the court below was of the opinion that a violation of this provision was charged, the fact that the indictment alleged the payment of the full schedule rate and the subsequent payment of a rebate, being in its opinion a sufficient alle-

gation that the *payment* was a *wilful failure* to observe the published tariff (Record, p. 32). But as we have said the question is not one of evidence, but of pleading. If in order to render an omission a crime it is necessary that the omission must have been a wilful one, and the indictment is silent on that subject, it does not allege all the elements of the offense, and is fatally defective. It is not enough that the court can see from other allegations, or that a jury would be justified in finding on proof of such allegations, that it was in reality a wilful omission. The "statutory words essential in the description of the offense cannot be omitted from the indictment."

1 *Bishop Cr. Proc.*, Sec. 618.

It is an essential ingredient of the offense now under consideration, and made so by the express terms of the statute itself, that the omission should have been a wilful one, precisely as the gravamen of the offense of *wilfully* misapplying of the funds of a national banking assication, consists in the evil design, &c.

In such a case "a count which should omit the words 'wilfully,' etc., and 'with intent to defraud,' would be clearly bad."

Evans v. *United States*, 153 U. S., 584.

The failure to allege this ingredient cannot be aided by resort to the other allegations.

> *"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially or by way of recital."*
>
> *United States* vs. *Hess*, 124 U. S., 483.

In the court below the Government cited the case of *United States* vs. *Caruthers*, 15 Fed. Rep., 309, in support of the proposition that when the act charged in an indictment "*shows* a violation of the

statute, that is all that is sufficient." If by this it is meant that it is enough if a violation of the statute is *alleged* we quite agree with him. But it is our contention that no violation of the statute is here *alleged,* and the *Caruthers* case entirely supports our position. There the indictment charged the defendants, who were inspectors of election at a congressional election, with a violation of Section 5515 of the Revised Statutes (since repealed) in having neglected and refused to perform a duty required of them by law in regard to the election, with intent to affect the election or the result thereof. Though the statute in defining the offense *did not use the word "fraudulent"* it was insisted that since the defendants acted in a judicial capacity, and therefore were not liable for mere mistakes, the indictment should have charged that their neglect was fraudulent. It is quite true that the court, in overruling the objection, after pointing out that the indictment followed the exact language of the statute, observed that this was "in effect charging that it was fraudulently done" (bottom of page 311); but this was no more than holding that the intent to affect the election was in itself fraudulent. If this intent had not been charged, or in other words, if the Court, in the absence of an allegation that the defendants intended to affect the election, had held that this intent was to be *inferred* from the averment that they neglected and refused to perform a duty required of them by law the case would be in point. But the decision in the *Caruthers* case was that the indictment *instead of omitting to charge an ingredient of the offense, did charge such ingredient in the very language of the statute.*

(*b*) *The indictment cannot be sustained on the theory that it charges a violation of "the provision*

of the Act (of 1887), prohibiting deviations from the published rates."

The court below thought that the "allegations of this indictment certainly support that charge sufficiently" (Record, pp. 31-32).

But the provisions of the Act of 1887, "prohibiting deviations from the published rates," were superseded and repealed by the Elkins Act.

(c) A "departure" from the legal rates does not in itself constitute an offense under the Elkins Act.

The fifth clause of Section 1 provides that:

> "Whenever any carrier *files* with the Interstate Commerce Commission or *publishes* a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and *any departure* from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

In the court below the Government took the position that by this provision Congress intended to add a new offense to those defined in the preceding parts of the statute.

But Congress had already indicated the kinds of departures which might be made the subjects of prosecution, viz.: unlawful rebates, concessions, and discriminations on the part of corporations or individuals, and wilful omissions on the part of corporation carriers to observe their tariffs. These offenses having been described and appropriate penalties fixed, Congress then laid down *certain rules of evidence* to be followed *"in any prosecution"* begun under the Act, namely, that *in any such prosecution* the duly filed and published rate was, as against the carrier, its officers and agents, to be conclusively deemed the legal rate, and that *in any such prosecu-*

tion any departure therefrom was to be deemed an offense.

Thus, if it appeared upon the trial of an indictment for giving rebates, concessions or discrimination, or for a wilful failure strictly to observe a tariff, that in the course of and as a result or part of the transaction as established by the evidence, there had been a departure or an offer to depart from the lawful rate, this was to be deemed conclusive evidence of the offense charged.

In other words, the fifth clause

> "simply provides the rule *as to the effect to be given to evidence* of participation when a carrier is being tried for a violation of the act."
>
> *United States* vs. *Camden Iron Works*, 150 Fed. Rep., 214, 218.

If it was intended to prohibit and punish as a crime any departure from the lawful rate, intentional or otherwise, no matter how brought about, and regardless of the purpose or result, then everything which precedes it was superfluous and idle. No court will ascribe to Congress an intent so absurdly at variance with the well understood policy which underlies interstate commerce legislation.

As Mr. Justice FIELD has said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."
>
> *United States* vs. *Kirby*, 7 Wall., 482, 486.

3. The allegations of the indictment, and of each of the counts, are so ambiguous and indefinite as to make it uncertain what is the exact offense or offenses intended to be charged.

The Elkins Act could be violated in many ways, *e. g.*, by the giving of rebates, by the making of concessions otherwise than by rebates, by various forms of discrimination, by wilful omissions to observe the lawful rates. Each of these would constitute a different offense. A defendant is entitled to know of what particular offense he is accused.

It is always necessary to specify on the face of the indictment

> "the criminal nature and degree of the offense which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offense. 1st. In order *to identify the charge*, lest the Grand Jury should find a bill for one offense, and the defendant be put upon his trial in chief for another, without any authority," &c.
>
> 1 *Stark, Cr. Pl.* (2d Ed.), 68.

If this indictment is susceptible of the construction that it charges, the giving of rebates, *or* a wilful omission to strictly observe lawful tariff rates, *or* any other violation of law; *or* more than one offense of any character; or if it is uncertain what precise offense is charged, it is bad. An indictment must be

> "free from all ambiguity, and leave no doubt in the minds of the accused and the Court of *the exact offense intended to be charged.*"
>
> BROWN, *J.*, in *Ledbetter* vs. *United States*, 170 U. S., 606, 610.

FIFTH.

The facts set forth in the indictment and established by the evidence constituted but a single criminal transaction, and but a single penalty should have been imposed.

It was error for the court to charge the jury that "the payment of each rebate constitutes a distinct offense" (65th Assignment of Error, p. 106) that the jury might find the defendants, or either of them, guilty "in regard to any of these shipments" (66th Assignment, *Id.*) and that it was for the jury to say whether the defendants, or either of them, was "guilty of these six offenses, or either of them" (67th Assignment, *Id.*). The verdict finding the plaintiff-in-error guilty of six offenses was irregular and invalid, and it was error for the court to sentence the plaintiff in error to the payment of more than a single fine (98th, 99th, 100th and 101st Assignments, p. 110).

Although the indictment charges two agreements of April 26, 1904, one to pay a rebate of five cents (Second Count, p. 7), and the other of three cents (Sixth Count, p. 24), on each hundred pounds of sugar shipped to the Edgar firm, the evidence shows that there was but one agreement on the subject, namely, that embodied in Pomeroy's "private and confidential" letter to Palmer.

By this agreement Pomeroy undertook "to handle Edgar's shipments · · · at a rate of 18 (eighteen) cents per 100 lbs., New York to Detroit, all-rail, shipments to be billed at tariff rates, and refund made by voucher" (p. 46).

The arrangement was to remain in force indefinitely. It covered all shipments to be made to the

Edgar firm during its existence. The refund agreed upon was the difference between 18 cents and the published rate, whatever that might be, and the total amount thus to be refunded depended wholly upon the quantity of sugar shipped. The arrangement was as definite in these particulars as though Pomeroy had in so many words agreed to pay back to Palmer as a rebate, so much of the full rate paid in the first instance by Palmer, on all shipments thereafter made to Edgar & Son, as was in excess of eighteen cents for each hundred pounds.

If, instead of putting in "claims" at irregular periods for portions of this refund, calculated upon the quantity of sugar shipped from time to time, Palmer had waited until the termination of the arrangement, and had then presented and been paid the whole amount, or if the settlement for the account had been from any cause deferred until that time, and then liquidated by the payment of a lump sum, no one would contend that more than one crime had been committed.

That this is at least the position of the Government is evident from the fact that in No. 67, argued herewith, but a single offense is charged as the result of the payment of $26,141.81 under a similar agreement, "on account" of five separate claims presented from time to time during a period of six months, in consequence of shipments extending over that period. In No. 285, however, twelve payments, although made on but seven different days, were made the subject of twelve counts.

So that, according to the novel theory of the Government, the number of offenses in cases of this character depends entirely upon the *number of payments made by the carrier*, regardless of the subject matter to which they relate, whether partial or complete, and even though they are all made "in respect of the transportation of continuous consign-

ments by one shipper under an arrangement specifically covering them all.

Upon this theory, if Palmer had put in a separate claim for each shipment, and had received a separate cheque in settlement of each claim, the indictment would have contained 482 or more counts, and the court would have been asked to impose fines not exceeding $4,820,000. If he had put in a separate claim for the difference between 18 cents and the full rate on each hundred pounds of sugar shipped to Edgar, and each of this multitude of claims had been separately discharged, the Standard Oil indictment would sink into utter insignificance as an example of how offenses can be multiplied, and billions, instead of millions, would have been the gauge of the penalty. If, however, he had put in but one claim, or if, regardless of the number of his claims, he had received a single cheque in payment of all of them, the court would have had a one-count indictment before it upon which a fine of $20,000 would have been the extreme penalty. If in either case the Buffalo office had split the payments into separate cheques, each cheque would have been made the subject of a separate count.

There must be something radically wrong in a theory which leads to such monstrous absurdities.

The fundamental vice is that it is utterly at variance with the universally accepted doctrine that whether criminal acts constitute one crime or more depends entirely upon the nature and circumstances of the acts themselves.

The quantity of a crime in a criminal transaction does not increase or diminish because of the quality of its criminality, or the period of time over which it may extend. If the transaction

> "is set in motion by a single impulse, and operated upon by a single unintermittent force, it forms a continuous act."

The rule thus clearly and accurately stated by

Wharton in treating of the offense of larceny (1 Crim. Law [10th Ed.] § 931) applies to all crimes (*Id.* § 27).

> "The distinction is this: when the impulse is single, but one indictment lies, no matter how long the action may continue."

and he adds in a note (*Id.*):

> "The test is whether the individual acts are prohibited, or the course of action which they constitute. · : · If the latter, there can be but one penalty."

No matter how long such an offense may occupy in its perpetration, it continues but one offense.

In re Snow, 120 U. S., 275.

In re Nielson, 131 U. S., 176.

If gas be feloniously drawn from a main during a long space of time by means of a fraudulent pipe, or a shaft of coal be fraudulently opened and quarried, in pursuance of a continuous design for several years, the transaction is single and to be indicted as such.

Reg v. *Firth*, L. R., I. C. C., 172; 11 Cox, C. C., 234.

Reg v. *Bleasdale*, 2 C. & K., 765.

See also

Reg. v. *Sheperd*, 1 C. C. Res., 117.

Woods v. *People*, 222 Ill., 293, 299-302.

> "Such," says Wharton (§ 931), "is also the rule of the modern Roman law with regard to the subtraction of wine from vats by a tube fraudulently applied. No matter how long the suction lasts, or how much wine is removed, the transaction is single so long as it rests on the original attachment of the tube. · · · If this reasoning be correct there can be, when there is such continuousness, but a single prosecution; and one prosecution for a section or part of the things taken absorbs the offense. If the prosecutor elect to take such a section, he cannot split up the transaction into a series of cases commensurate in number with the particles of the mass taken.

Such is the reason by which eminent German jurists have reached the conclusion that for a continuous offense there can be but a single prosecution, unless some extrinsic force necessitates the breaking of the offense into fragments. The same view is practically accepted in England and the United States."

(a) *The principle underlying the rule which forbids the recovery for aggregated penalties under a penal statute unless the language of the statute clearly requires it, is peculiarly applicable to strictly criminal prosecutions.*

"If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress the subject, or the government the citizen by unnecessary prosecutions."

State v. *Cooper*, 13 N. J. L., 361.

"This notion of rendering crimes, like matter, infinitely divisible, is repugnant to the spirit and policy of the law and ought not to be countenanced."

State v. *Commissioners*, 2 Murphy (N. C.), 371.

(b) *The Elkins Act, so far from authorizing the splitting up of the transaction upon which the indictment is based into separate offenses, impliedly forbids it.*

There is nothing in the Elkins Act expressly authorizing the imposition of a distinct punishment for each separate payment, and in the absence of such express authority none will be presumed or assumed.

Under U. S. Rev. St., §§ 4386, 4390, making it unlawful for a common carrier of live stock to confine the same in cars for a longer period than 28 hours without unloading, etc., it has been held that the unlawful confinement of each animal, or of each car-load does not constitute a separate offense.

United States v. *B. & A. R. Co.*, 15 Fed. Rep., 209.

United States v. *St. Louis & S. F. R. Co.*, 107 Fed. Rep., 870.

In the case last cited the court said (107 Fed. Rep., at p. 872):

> "No reason can be assigned, in the opinion of the court, why the unlawful confinement of each car-load of animals should be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of car-loads shipped, which would not apply with equal force to the unlawful confinement of each animal. Manifestly, if Congress had intended to impose upon a railroad company the maximum penalty of $500 for each head of cattle that might be unlawfully confined upon one of its trains, it would not have left it to *construction* or *inference*, and it may be with equal propriety said that, if Congress had intended to inflict so severe a penalty as $500 for each car-load of cattle that might be unlawfully confined, it would not have left it to *construction* or *inference*. It was an easy matter for Congress to have said, if it had so intended, that the unlawful confinement of each animal, or each load of animals, should constitute a separate offense. And in reference to a statute so highly penal as this, the construction must be strict—equally as strict as if it were a statute creating a criminal offense."

Ii will be observed that not only is there no provision in the Elkins Act for the imposition of a fine for "*each offense*," but that it is the giving of "*rebates*"—not the giving of *a rebate*, or of *each* rebate, that is made a misdemeanor.*

Not only that, but in the clause prohibiting the non-observance of published tariffs, it is expressly provided that "upon conviction, the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 *for each offense*."

*"Every * * * corporation who shall * * * give any such rebates," &c.

It is to be assumed that this carefully expressed difference in the penalties for these offenses was purposed, and that when Congress intended that the fines might be imposed for each offense and so cumulated, it so stated.

If Congress had meant to give countenance to the course pursued by the Government in this case it would not have left it to *construction* or *inference*. By the Hepburn Act (Sec. 16) any carrier who knowingly fails to obey an order of the commission forfeits $500 for each offense. "Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense." How simple it would have been to provide in the Elkins Act that every separate payment, partial or otherwise, under a rebate arrangement should be a separate offense; or simpler still, that "in the case of a continuing arrangement, each day shall be deemed a separate offense."

(*c*) *The transaction upon which the present prosecution is based constituted but one violation of the statute.*

If the number of rebates, and consequently the number of criminal offenses, involved in such a transaction as that now before the court, depends upon the number of re-payments, or partial re-payments, made by the carrier to the shipper, it follows that it is competent for the carrier at its election, by consolidating or separating its payments to give to its acts the quality of one crime, or of many, at its pleasure. If so, the carrier's control over the form and penal consequence of its own prosecution would be greater than that of the state itself, for, as has been said,

> "It is not competent for the state, at its election to give to defendants' act the quality of one crime or of four, at pleasure. The act partakes wholly of the one character or wholly of the other."
>
> *State* v. *Egglesht*, 41 Iowa, 574.

It is is doubtless *convenient* to regard the settlement, or, partial settlement, of each claim, as an independent transaction. This is what was done in the *Hanley* case, *supra,* and a similar rule seems to have been followed to a certain extent by the Circuit Court of Appeals in the recent *Standard Oil* case. But such a rule is purely *arbitrary.* In the case at bar the offense denounced by the statute is the giving of a rebate *in respect of the transportation of property in interstate commerce.* The indictment alleged the giving of six rebates, each being charged to have been given at separate times in respect of the transportation of property from day to day during a specified period of time. The proof established six payments, two of which were made in discharge of two separate claims covering shipments during April and May. Another was in discharge of two separate claims, one covering shipments during July and the other shipments during August, while each of the three others was in discharge of a separate claim for shipments during June, September and October, respectively. But each payment was, and all of them were, made in respect of continuous almost daily shipments extending over this entire period.

Either the aggregate payments constituted one rebate in respect of all the shipments, or each payment was made up of as many rebates, and therefore constituted as many offenses, as there were separate acts of transportation. On the latter principle there might have been an indictment covering the transportation of each separate day's shipments, or each train-load, or each car-load, or each barrel or bag, or each one hundred pounds. The hundred-pound standard would perhaps have been the more reasonable one, since it was that which was made the basis of the agreement of April 26, 1904. And indeed there would have been some plausibility in reckoning the gross amount of the payments as

so many thousand rebates of five cents, or three cents, "per" each one hundred pounds of sugar transported, for it could be argued that this was the standard fixed by the parties themselves, and that as it turned out a rebate of five cents, or three cents (as the case might be), was in fact paid in respect of each one hundred pounds of sugar transported.

But there is no authority in law for thus splitting up the transaction. The principle laid down in the *Snow* and *Nielson* cases is controlling. The single offense herein alleged and proven had its inception in the agreement of April 26, 1904. The subsequent shipments, the prepayment of freight charges, the *seven* claims, and the resultant *six* repayments (which the indictment charges to have constituted as many payments of rebates, but which were in fact *partial payments* of the total refund agreed upon), were mere parts and incidents of the transaction, the whole resulting in the accomplishment of exactly what was planned, namely, the repayment of a rebate of $8,913.27, made up of six partial payments in respect of the transportation of the aggregate shipments made under the agreement. This formed, obviously, but a single continuous transaction and is not susceptible of being broken up into a series of offenses.

SIXTH.

The court erred in instructing the jury that they might take into consideration upon the question of intent the evidence that the original claims had been destroyed, and the fact

> "that when Embleton, the man in charge of these shipments, left the employment there, a book containing entries in reference to these claims disappeared, and that Mr. Wilson testified in this case, that he did not know where it was."

In the first place, Mr. Embleton had not "left the employment there." In the second place, the book had not "disappeared," and the Government was allowed to use carbon copies showing all the facts as to which besides there was no dispute. Plaintiff-in-error and the Government had agreed as to the facts of all the "various shipments mentioned" in the indictment; also that "claims for the difference between the full tariff rate" were filed with plaintiff-in-error by "Lowell M. Palmer" (p. 47).

The only evidence on the subject of the so-called "disappearance" of a book was that given on the direct examination of the witness Wilson called for the Government. He said that Embleton "went away on the 17th of March, and I have not seen him since. He went to San Antonio, Texas. His leave of absence extended until his health recovered and he came back. He has not yet returned. . . . I think during the year 1904, Mr. Embleton kept a record of these claims in a book. I have been subpœnæd to produce that book. I have made a search for it. I cannot answer whether that book formed a large part of my office records until last March. I have seen it in Mr. Embleton's custody on his desk. I have not seen it since his departure. I may not have seen it for a year, or probably six months previous to his departure" (p. 58).

The witness testified to an established custom of destroying claims after they had passed through the audit department, and the distribution among the different companies had been made. "When that was done there was no further use for those papers. We got a large number of claims. We had not much room to keep the records and they were destroyed. They were not required after our audit anyhow" (p. 59).

The indictment was found in May, 1906, p. 28, more than two years after the letters between Pom-

eroy and Palmer (p. 85) and the nearly two years after the presentation of the earlier claims (p. 92).

Mr. Embleton was not on trial. The Government introduced no evidence whatever which warranted even a reference to the doctrine of *contra spoliatorem* as against the plaintiff in error.

The evidence introduced by the Government seemed to have for its purpose no more than the laying of proper ground for the introduction of secondary evidence.

CONCLUSION.

The judgment of the Circuit Court should be reversed and the proceedings remanded to that Court with instructions to sustain the demurrer and dismiss the proceedings.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 57.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

THE UNITED STATES.

REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

FIRST.

Of the Doctrine of Corporate Criminality.

After citing authorities holding that a principal is liable *civiliter* for the acts of his agent, even though knowledge of the act or any direct authority to commit it be not fastened upon him, our learned opponents take the broad ground that *"The doctrine announced in these cases is controlling also upon criminal prosecutions"* (Brief for the Government, p. 31).

This view, except as to corporations, was utterly repudiated by the learned trial judge in denying the motion to quash the indictment. He thought that "where the individual servant is guilty of the criminal act in the course of his master's business, and there is no evidence whatever that the

master consented to it, or had anything to do with it, the general principle of law would be that a statute making the master criminally punishable in such a case as that was invalid" (Record, p. 43).

The reason why such a statute would be a nullity is, manifestly the lack of power in the national legislature to impute to one individual the crime of another, and thus punish the innocent for the act of the guilty.

The learned trial judge, therefore, endeavored to draw a *distinction* between the relationship of corporate officers and that of private agents toward their respective principals, saying: "But a corporation is an essentially distinct entity. It only acts by its officers, and there is no such *separation* between the corporation and its officers, although they discharge duties which make them for certain purposes under the civil law servants, and the relation between them is that of master and servant, yet the relation *is essentially different* from that which would be the relation between an individual master and an individual servant, and I think it is entirely competent for Congress to provide that a corporation shall be criminally liable for the acts of its agents which constitute crimes, if it sees fit to do so" (*id.*).

In other words, this supposed *essential difference* in the two relations, namely, that there is no "such *separation*" between the corporation and its officers as there is between the individual master and his servant, affords valid ground for legislation subjecting corporations to prosecution and punishment for the acts of their officers and agents, which, concededly, would be unconstitutional and void if directed against the individual. But what possible bearing has a difference in the relationships, assuming it existed, to do with the question under discussion? The ultimate effect of imputing the crime of a corporate officer or agent to the corporation itself is to punish the individuals who constitute the corporation. If this is inadmissible in the case of indi-

vidual principals, or co-partnerships, it must be equally inadmissible in the case of corporations.

There is, however, no less "separation" in the case of corporations and their agents than there is between an individual master and an individual servant, or between one partner and another. The law, upon grounds of public policy, holds a corporate or individual master alike responsible in damages for private injuries committed by their servants. The same general principle extends, on precisely the same grounds, to partnerships. This doctrine, however, arises out of the ordinary law of agency, which has no place in criminal jurisprudence, which deals with facts and not with fictions, and in which the theory of notional or constructive guilt is utterly rejected.

The modern notion of corporate criminality has been evolved and is now being invoked for the purpose of reaching and punishing arbitrarily, not the individual who has committed the crime, but those (namely, the natural persons composing the corporation) in the course of whose business it has been committed, regardless of their actual guilt, on the now popular theory that (as the learned trial judge stated it) when corporate agents commit such crimes their acts are either actually authorized, or the agents *suppose* they are, and that they will be approved. This tenet of what might well be called a twentieth century economic and social philosophy was, in his opinion, probably the motive and inspiration of the Elkins act. *"Everyone knows,"* he says, "that practically in this class of cases, where rebates are given by freight agents or transfer agents, it is either actually authorized by the corporation, or the agent *supposed it was authorized,* or that it *would be approved,* and the moneys paid by the corporation are not paid by the agent in actual ordinary practice. To say *under these circumstances* that it is not within the power of Congress to provide that a corporation can be fined because of the action of its agents, *even if the government is not able to show that*

the corporation took any part in authorizing the proceedings, it seems to me would be to apply the ordinary principles of master and servant as they exist between individuals to a case which ought not to be strictly governed by them" (pp. 43-44).

Every one does not know, nor is it true, that when in "this" or in any other similar "class" of cases, any agent commits a crime in the course of his employment, he does it by the authority of his principal, or *supposes* he is doing so, or *supposes* his crime will be approved. But even if public morality had fallen to so low an ebb as the learned trial judge thinks it has, the law has not yet taken cognizance of it. The presumptions of honesty and upright conduct still, happily, survive. Even the civil law assumes, though a rascally private or corporate employee may *suppose* otherwise, that no employer will authorize, approve or ratify a dishonest, much less a criminal, act.

The trial court held, however, that in view of the *notorious fact* that when the agents of a railroad corporation give rebates, either their acts are actually authorized, or they suppose they are, or that they will be approved or authorized, it is competent for Congress to provide for the punishment of the corporation, "*because* if the action of its agents, even if the Government is not able to show that the corporation took any part in authorizing the proceedings"—that is, Congress has power to fine the corporation, which fine must be paid by the individuals who compose the corporation, even though the latter did not authorize the acts, and were therefore innocent of any crime.

This, according to the position taken by the trial court, is a valid and legitimate exercise of the power lodged in Congress by the Constitution, in view of the *essential difference* between the relationship of a corporation to its agent, and that of an individual or a partnership to its agent.

A.

We have no hesitation in expressing the belief that this court would promptly have pronounced the statute unconstitutional if the penalty clause had declared that on the conviction of the corporation each stockholder should be imprisoned, if but for the briefest space of time, or be subjected to any other form of corporal punishment, or that each stockholder should pay nominal fine; or had provided for the infliction upon the corporation of "a fine of not less than one thousand dollars nor more than twenty thousand dollars, *to be paid pro rata by the stockholders of such corporation;*" or had said in so many words, that upon the conviction of the corporation, "the interest of each stockholder in the assets of the corporation shall be diminished *pro rata,* to an amount in the aggregate of not less than one thousand dollars nor more than twenty thousand dollars." In either case would this court regard its constitutionality a very serious question?. Yet the effect of the statute, as it stands, is precisely the same as though it read:

> "Every act, omission or failure, made punishable by this act, of any officer, agent or other person acting for or employed by any corporation, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of each and every stockholder of such corporation, as well as of that person, and on conviction thereof such stockholders shall be severally punished by a fine of not less than one thousand dollars, nor more than twenty thousand dollars, to be paid out of the corporate treasury, against which payment the interest of each stockholder in the assets of the corporation shall be charged *pro rata,* according to the number of his shares."

B.

The position of the Government is that "the indictability of a corporation for crime is a legal doctrine too well *settled*

by authority to require at the present day argument in this court." They point out that this court has affirmed many convictions of corporations for criminal offenses, and that the decision in *Hale v. Henkel*, 201 U. S., 43, that the constitutional guaranty against compulsory self-crimination does not shield a corporation, was "pointless and unnecessary" if a corporation is immune from criminal prosecution. They show that if our position is sound a large number of other important federal statutes are as constitutionally objectionable as the interstate commerce acts, and call attention, as indicative of the "recklessness" with which we have taken up our "fundamental position" as they express it, to the fact that, if we are right, "every one of the innumerable convictions which are a part of the well-established policy of all of our states, could be set aside on appeal to this court." Finally, after stating that the case of *State v. Great Works Mills Co.*, 20 Me., 41, was expressly overruled twenty-five years ago—which is not entirely accurate—they sum up their argument by citing ten decisions as authority for the statement that "the variety and large number of offenses for which corporations have been held criminally liable crushingly demonstrates the fanciful and archaic contention of the plaintiff in error" (Brief for the Government, pp. 18-22).

It will be observed that no effort has been made to *meet* any of the arguments advanced by us. The position of our adversaries is, simply, that the point is *settled*. But let us see if this is true, and, if so, *how* it is settled.

(*a*) If the slightest question had been raised in this court by any of the corporations whose convictions have been affirmed, touching the constitutionality of the laws under which they were convicted, a reference to those cases might perhaps have been warranted, even in the absence of any expression of the court's views on the subject. The mere fact that such judgments have been affirmed is, however, of no possible moment. General warrants to apprehend per-

sons suspected of the authorship of seditious libels, and to bring them and their papers to be examined before the Secretary of State, were frequently issued in England from the time of the Revolution until Lord Camden's famous decision in *Entick v. Carrington*. No action had ever been brought to test their validity, and, although they had been often produced upon the return of writs of *habeas corpus*, no court of justice had ever declared them illegal. It was argued "that an usage tolerated from an era of liberty, and continued downwards to this time, through the best ages of the constitution, must necessarily have a legal commencement." But it was held that the practice was "much too modern to be evidence of the common law, that a 'general submission' to the authority of such warrants was of no consequence, and that they acquired no strength from the silence of the courts. "As no objection was taken to them upon the returns," said Lord Camden, "and the matter passed *sub silentio*, the precedents were of no weight" (11 Harg. St. Tr. 321).

The failure of counsel representing corporations to object heretofore to the present-day practice of indicting corporations is of far less significance than the general submission of the English people to the odious general warrant system; for it may well be that in the cases which have been before this court the individuals whose acts were attributed to the latter preferred that the corporations, and not themselves, should be the subject of prosecution; and this may have been an excellent reason why the question was not raised in the case of *Hale v. Henkel*.

(*b*) It may not be out of place to here suggest that if corporations are not shielded by the constitutional immunity against self-crimination (*Hale v. Henkel, supra*), and that the double jeopardy provision of the Fifth Amendment is limited in its application to natural persons (*Railroad Tax Cases*, 13 Fed. Rep., 722) this should seem to furnish excellent, if not conclusive reasons why corporations should

not be treated as "persons" liable to criminal prosecution and punishment.

(*c*) It is true that if Congress was without powers to enact the statute under which the plaintiff in error was convicted, all federal statutes under which corporations are now being held criminally responsible are equally invalid; the argument, implied by a reference to this fact, that it is necessary for the ends of the Government to uphold the power we attack, is not one which will appeal to this court. It is the old argument of "state necessity" of which Lord Camden said (11 Harg. St. Tr., 322): "It is then said that it is necessary for the ends of government to lodge such a power with a state officer, and that it is better to prevent the publication before than to punish the offender afterwards. I answer that, if the legislature be of that opinion, they will revive the licensing act. But if they have not done that I conceive they are not of that opinion; and with the argument of state necessity, or a distinction that has been aimed at between state officers and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions."

There is, however, no occasion for prosecuting corporations. Their conviction is not necessary to the vindication of justice. When the really guilty perpetrators of a crime are prosecuted and punished the law is satisfied, and the matter is at an end. There never was a time when by the exertion of a small part of the proper power given to its administrative officers by the Interstate Commerce Act any actual offender of its provisions might not have been speedily and successfully prosecuted. Especially has this been true of offenses committed by the officers and agents of carriers. All persons connected with illegitimate transactions could be called and compelled to testify, and the real instigators of the crimes thus reached, however high or powerful they might be. The corporate books and papers

have been subject at all times to examination, so that if anybody in corporations had authorized or had anything to do with offenses against the law, appropriate proceedings would have brought them to justice. No railroad president, director, or official of high or low degree, if really guilty, could have escaped conviction upon the evidence of the witnesses concerned in the offense, and whose incriminating testimony could have been forced from them by the Attorney-General under the statute. By this means the law would have been satisfied and the public interest fully served.

C.

We now come to the argument of *utility*, which runs through the entire brief of our opponents. It is based upon the assumed inconvenience and difficulty of enforcing the statute against individuals, and was thus stated by the trial judge: "It is generally understood," he observed, "that the consideration which led to the passing of the Elkins act was the fact that it was found *difficult to convict officers* of a corporation, particularly in view of the fact that they were liable to punishment by imprisonment, because jurors thought, and perhaps thought properly, that the corporation was the party that ought to be punished, and the officers ought not to be punished for doing what *presumably* they did in accordance with the wishes of the corporation, but which it was often *difficult to show that anybody in the corporation authorized, or that anyone had anything to do with it, except the officers who were directly concerned* with making the agreement to pay rebates and paying rebates. It was to meet *that difficulty* that the Elkins act was passed" (Record, p. 43).

If there was ever any difficulty in convicting corporate officers of violations of the Interstate Commerce Act it was due not so much to any defect in the law as to the remissness of those who should have put it in execution. It is utterly inconceivable that jurors wantonly acquitted corporate offi-

cers whose guilt had been established by adequate legal proof, on the theory that their offense was, *presumably*, committed "in accordance with the wishes of the corporation," notwithstanding the absence of any evidence to that effect. It was not the difficulty of convicting corporate officers, but the inability to reach those particular individuals upon whom the Government had been unable to fasten guilt by the *ordinary methods* of the criminal law, and in order to punish them *without evidence* of their guilt, that recourse was had to legislation introducing civil analogies into the criminal law.

The real purpose of the Government has always been to reach *human beings* and not *juridical "persons."*

D.

The doctrine of corporate criminality enumerated in the cases cited by the Government (Brief for the Government, pp. 21-22) has no support in the fundamental principles underlying *criminal* as distinguished from civil jurisprudence.

The criminal law has no application to any except natural persons (2 Jurid. Soc. Papers, 31). This must be so in the nature of things. The purpose of the criminal law is punishment which cannot be visited upon a corporation as an abstract thing, and ceases to be punishment if visited indiscriminately upon the individuals who compose the corporation regardless of their personal guilt or innocence. The great deterrent object of punishment is, moreover, defeated if thus visited either upon the corporation as a legal entity or upon the innocent and guilty stockholders alike.

No principal was more firmly implanted in the laws of England at the time the American colonies gained their independence than that corporations were not amenable to criminal prosecution.

Lord Coke said: "For a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. * * * They cannot commit treason, nor be outlawed, nor ex-communicated, for they have no souls (10 Co. 32*b* [1612]). If the criminal law applied to corporations *at all* Coke would have said so. He was not accustomed to confine the great extent of his knowledge to the precise and single question treated, but to advert with learned industry to every phase of the subject. He would not have laid down with so much exactness that corporations were incapable of committing treason and yet have forgotten to add that they were capable of committing other crimes, if it were so.

The accuracy of the report attributing to Lord Chief Justice Holt a ruling that a corporation is not indictable, "but the particular members of it are" (Anon. 12 Mod., 559 [1701]), has frequently been impugned in comparatively recent time, however. But there cannot be the slightest doubt that such was the law of England until long after our constitution was adopted. The difficulty was in reconciling the *dictum* of Holt, for we think there can be no doubt he uttered it, with the practice which had prevailed from time immemorial of indicting corporations for *non-feasance, e. g.,* the failure to repair roads in violation of the duty imposed upon the corporation by law.

The cause of this confusion was the entirely false assumption that these indictments against corporations were prosecutions for *crime.* Nothing could have been further from the real character and purpose.

Mere indictability is never the test of criminality since there are cases in which an indictment is prescribed merely as a civil remedy (*Rex v. Robinson,* 2 Burr., 799; *Reg. v. Paget,* 3 F. & F., 29; *Bancroft v. Mitchell,* L. R. 2, Q. B., 549). On the other hand a suit for a penalty, though civil in form, is really criminal in its nature (*Boyd v. U. S.,* 116

U. S., 616; *Lees v. U. S.*, 150 U. S., 476). So a proceeding against a bankrupt for not obeying an order for the payment of a weekly sum for the support of his mother is "in the nature of criminal process" (Blackburn, J., in Bancroft *v.* Mitchell, *supra*).

There were three ways by which at common law parties or districts liable to repair highways might be prosecuted for suffering them to decay; by indictment, information, and the presentment of a judge or justice of the peace. "Of these," says *Chitty*, who wrote in 1816 (vol. III, 5th Am. Ed., p. 569), "indictment is now the more usual course of proceeding. An information may indeed be granted, in the discretion of the King's Bench, on such a cause, *Sir Tho. Raym*, 384; *Hawk.* b. 1, c. 78, S. 24; *Ante*, vol. I, 851. But they will not give leave to file it when the way is not much used, and there appears to be another road as convenient for the public in sufficient repair. Indeed, they never allow it except in cases of great importance, or where the grand jury has been guilty of gross misbehavior in refusing to find the bill, *ante*, vol. I, 851; because the fine on conviction on such a proceeding cannot be applied to the repair of the nuisance, which is always the case when the party is indicted, *Bac. Abr. Highways.*" Further, the same author says (at p. 575, par. 6): "As the *object* of this prosecution is *not the punishment of the defendant*, but the repair of the highway, it is not indispensably requisite that he should be in personal attendance at the time judgment is pronounced upon him, and where a district is indicted this is, of course, impossible (1 Salk. 55, 6; Hawk. b. 2, c. 48, s. 17, *ante*, vol. I, 695, 6). Where an individual has been found guilty, he may obtain a rule to show cause why his personal appearance may not be excused on his agents engaging to pay such a fine as the court may assess; and if the prosecution acquiesce, or no sufficient reason to the contrary is shown, the court will make a rule absolute, and give the judgment in the defendant's

absence (*vol. I, 696*).* The judgment against the defendants usually is, that they should pay a fine and repair the nuisance (*Bro. Abr. Nuisance,* 49, 8 T. R. 142, 3). But if a justice of the peace grant a certificate that the road is now in good condition, the court will merely assess a small fine, as 6s. 8d. or 13s. 4d. 13 *East,* 164, 3 *Smith,* 575, 6 *T. R.,* 635). And if the certificate states that the way has since been diverted by the order of two justices, and that so much of the old way as is retained is in repair, the sentence will only be passed for the nominal penalty (13 *East,* 166, 7). * * * The fine is not to be returned into the Exchequer but paid to such persons as the court shall order, and applied to the repair of the road in question. * * * But justice will not be satisfied with a payment of the fine, for a *distringas* will be issued in *infinitum,* until the road is put in a state of sufficient repair" (1 *Salk.,* 359, 6 *Mod.,* 163).

Holt himself had had before him at least three nuisance cases against municipal corporations, viz: *King v. Inhabitants of the Parish of Hornsey* (3 W. & M.); *Queen v. Inhabitants of Clueworth* (3 Anne), and *Queen v. Inhabitants of the County of Wilts* (*Id.*). All of these cases are reported in *Holt's Rep.,* 338-339. One of them, at least—the *Clueworth* case—was upon an *indictment* which charged the defendants with having neglected to repair a common footway. The defendants, having "submitted by pleading guilty," the court before it "would set a fine, would be certified by some of the justices of peace of the neighborhood, that the way was sufficiently repaired," Holt observing: "If one be found *not guilty* upon such an indictment, he is quit of being fined; but a *distringas* shall go to the sheriff against

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* "But where the object of the prosecution is to remove a nuisance, or repair a road, to which the fine is to be applied, and is often in the nature of a mere trial of right, the defendant may obtain a rule to show cause * * * and if the other party agree, or, on argument, the judges think the request reasonable, they will make the rule absolute, and give their judgment in the defendant's absence."

him till he certify the way is repaired." After a verdict of acquittal, as well as a verdict of guilty, the court, under very special circumstances, suspended the entry of judgment in order that the question might be reconsidered on *another indictment*, without the prejudice of a former judgment. *Rex v. Inhabitants of Wandsworth*, 1 Barn. & Ald., 63; *Reg. v. Inhabitants of Middlesex, Ibid.*, 64, *notes*. This shows necessarily that the remedy by indictment in cases of this character was in no sense a criminal proceeding, a conclusion confirmed by Holt's declaration in the *Wilts* case, that if an order to repair made by justices of the peace "be not obeyed, an attachment may go against the inhabitants of the whole county, and catch as many as one can of them." Holt ruled, moreover, in the *Wilts* case, that a *new trial* might be granted for the exclusion of good, or the admission of improper, evidence, "though the other party has a remedy by *bill of exception*." Writs directed against defendants who have been acquitted, new trials, and bills of exceptions in criminal cases were *unknown* in Holt's time.

Kyd, writing in 1793, said: "If a corporation has been used for time immemorial to repair a creek, that creates an obligation to keep it in repair, and an action may be maintained against the corporation for not repairing it by any one who has sustained any damage from its not being in a state of repair (*Vid.*, the *Mayor of Lynne v. Turner*, Cowp., 86). It is, indeed, reported to have been said by Lord Chief Justice Holt (12 Mod., 559) that 'a corporation is not indictable, but the particular members of it are'; but I apprehend that this can *apply only to the case of a crime or misdemeanor*, and that an indictment may lie against a corporation in the cases mentioned, as well as against a county or a parish (*Vid.*, in *Doherty's Crown Circuit Assistant*, 398, a precedent of an indictment against the Mayor and Burgesses of the city of Gloucester for not repairing the gaol)." (*Kyd on Corporations*, pp. 225-226.)

We may then accept as entirely accurate *Blackstone's* statement that a corporation "cannot commit treason or

felony or *other crime* in its corporate capacity; though its members may in their distinct individual capacities. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporeal penalties, nor to attainder, forfeiture or corruption of blood" (*Blacks. Com.*, ch. 18, § 12).

E.

We have set forth in our main brief the reasons given by some writers of authority why corporations are not, and cannot be made, the subjects of criminal prosecutions. As indicating that these reasons apply to all places and to all systems of jurisprudence, we quote the views of two eminent German writers: "Individual persons only, says *Merkel* (*Holtz. Straf.* II, 111), "can be made criminally responsible. Juridical persons cannot be thus made responsible. It is true that they cannot be regarded as inert masses of rights, for they are endowed by the law with independent business activity. But their will is a mere artificial creation; they are not possessed of that free, independent, personal action which is essential to penal responsibility. Suppose that a mayor, under authority of a municipal corporation, should organize a band of robbers in the town hall? Responsibility would be attached exclusively to the persons who thus abused their office." "Corporations," says *Geib* (Lehrbuch, § 87), "cannot as such commit crimes, as they are mere fictions, without the power of personal determination. They have no free will, but are bound by the will of the natural persons of whom they are composed. The latter are the responsible parties." *Wharton* (Cr. L. [10th ed.], vol. I, § 92. *note*, p. 116) observes that this is not "inconsistent with legislation by which an indictment is used as a process against a corporation guilty of *negligence through its agents*," citing *Com. v. Boston & Lowell R. R.*, 126 Mass., 61, and *People v. Cent. R. R.*, 74 N. Y., 302, which is quite true if the rule be limited to the use made of indictments in the cases cited.

F.

There being no express authority in the Constitution for the imposition of criminal liability upon a corporation, from what source did Congress derive its power to enact the legislation now under consideration?

(*a*) The federal bill of rights deals very extensively with the subject of criminal prosecutions, and one would suppose that if corporations were deemed proper subjects of penal discipline some mention would have been made of them. But so far as any implication can be drawn from the early constitutional amendments, their silence on the subject precludes the idea of any possible criminality on the part of corporations.

(*b*) All of the decisions cited by our adversaries, except such as are purely nuisance cases, and therefore not criminal cases at all, proceed entirely upon the analogy of the civil law. About the time when Blackstone wrote his commentaries an even greater lawyer than he said: "The argument, drawn from the courts of law applying the principles of law to new cases as they emerge, is altogether frivolous, inapplicable, and arises from a total ignorance of the bounds between civil and criminal jurisdiction, and of the separate maxims that govern these *two provinces of law, that are eternally separate.* Undoubtedly the courts of law, where a new case comes before them, as they do every hour, then, that there may be no defect in justice, call in similar principles, and the example of the nearest determination, and do everything to draw the law to as near a conformity to general equity and right reason, as they can bring it with it, being a fixed principle. *Boni judicis est ampliare justitiam*—that is, to make open and liberal justice. *But in criminal cases this parity of reason, and these analogies, ever have been, and ever ought to be shunned*" (Edmund Burke; Speech in the House of Commons, Feb., 1771.) Have times so changed that the same maxims now govern these two legal provinces in common? Are the bounds be-

tween civil and criminal jurisdiction entirely obliterated? Are men today, because they are civilly liable to compensate injuries resulting from the acts of the agents, to be also *punished* for those acts? Is there any more justification today for the violation of the fundamental principles of *criminal* jurisprudence than there was in the days of Burke?

The new doctrine, by means of this process of analogical reasoning, has within a comparatively few years advanced to such an extent that today it is gravely declared that "the same law that creates the corporation may create the crime, and to assert that the legislature cannot punish its own creature because it cannot make a creature capable of violating the law *does not, in my opinion, bear discussion*" (Hough, D. J., in *United States v. MacAndrews & Forbes Co.*, 149 Fed. Rep., 835).

In *State v. B. & O. R. R. Co.*, 15 W. Va., 362, in which it was held that a corporation might be indicted for Sabbath-breaking, Green, President, after observing that the courts had shown a tendency to extend the civil liability of corporations to the extent of subjecting them to exemplary damages for the wrongful acts of their agents, *e. g.*, libel, malicious prosecution, assault and battery, said (p. 380):

> "The suits of libel and malicious prosecution are in their nature very *like to criminal proceedings;* and if they lie against a corporation *it would seem to follow* that there are cases for which indictments may lie against a corporation where the evil intention constitutes an element of the offense, and *if a corporation* is, as has been said, *liable civilly for an assault and battery* committed through its servants, it is perhaps going too far to say that a corporation can in no case be *liable criminally* for any offense against the persons under any circumstances."

In *State v. Passaic County Agricultural Society*, 54 N. J. L., 260, although the only question before the court was whether a corporation was indictable for keeping a disor-

derly house—which is a *public nuisance,* Van Syckle, *J.,* improved the occasion to observe that in these days, "when the great concerns of business are carried on chiefly through these artificial persons, it would be *most oppressive* to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution." Coming to the argument of analogy, he said: "It is difficult, therefore, to see how a corporation may be amenable to *civil suit* for libel and malicious prosecution and private nuisances, and mulcted in exemplary damages, and at the same time not be *indictable for like offenses* where the injury falls upon the public" (p. 264).

These expressions, which are but illustrative of the present attitude of the courts to the subject under consideration, show how completely the rules of the civil and criminal law have been confounded. It is quite true that when individuals become corporate stockholders they subject themselves to the well-understood liabilities that are the necessary and proper incidents of such ownership. Public policy requires the enforcement of personal liability to this extent. There is nothing harsh or unjust in compelling a man to compensate one who has suffered injury through the act or omission of his servant, whether such servants be his own or that of a corporation of which he is a member. It is a very different thing to *punish* him, if, and because, the acts of the servant happen to constitute a crime. It is surely not too much to say that immunity from being punished as a criminal when wholly innocent of any crime is one of the fundamental and inalienable rights of every American citizen. It would, indeed, be difficult to imagine a right more essential to the liberty which our Government was created to preserve. This right is arbitrarily violated by the application of the rules of civil liability to criminal prosecutions.

The quotation in our main brief from *State v. Great Works Mill Co.,* 20 Me., 41, was cited in support of the proposition that a corporation's capacity for crime is only

that possessed by the majority of its human agents, and is the same thing. We had previously conceded the indictability of corporations for "wrongs which are in the nature of nuisances" (*Id.*, p. 35), but "not crimes in any accurate sense of the word" (*Id.*, p. 37). The fact that the Maine court erroneously assumed that the maintenance of a nuisance was a crime in no way impairs the force of its reasoning based upon that erroneous assumption.

The doctrine of *State v. Great Works Mill Co.*, 20 Me., 41, "so far as relates to *indictments of this character,*" viz., for *public nuisances,* has not only been denied in Vermont and New Jersey, but in many other States, and that doctrine was indeed expressly and very properly overruled in *State v. Portland,* 74 Me., 273. But there is nothing in the opinion in the case last cited detracting in the slightest degree from the force of its reasoning, as applied to the theory of corporate *criminality.*

F.

It is no answer to the argument, that the indictment of a corporation may result in punishing innocent members of it, to say that the stockholders select the directors and that it is their duty to see that those in charge of the affairs of the corporation do not violate the law. It would be quite as reasonable to contend that a partner might by legislation be made criminally liable for the acts of his co-partner, upon the ground that he knows when he enters a partnership that he cannot control it, and therefore assumes the risk of being punished for his partner's crimes. A stockholder or minority director can no more prevent the commission of such statutory offenses as those for which corporations have been recently fined in heavy sums than a member of a partnership, however anxious, can prevent a dishonest associate from violating the law.

G.

One of the ways of discovering whether a theory is true or false is by comparing it with the result of putting it in actual practice. A case which actually occurred since the passage of the Elkins Act enables us to apply this test to the doctrine of corporate criminality. About the entire capital stock of a small railroad company was purchased by a trunk line, and made a part of its system. It subsequently developed that during a period antedating the transfer of its stock ownership the officials of the purchased corporation had systematically violated the rebate provision of the Elkins Act. An indictment containing numerous counts and upon which penalties amounting to many times the value of its entire capital was returned against the offending corporation. The directors and stockholders of the purchasing line, now practically the only stockholder of the accused corporation, had no knowledge or suspicion of the transactions upon which the indictment was based. The greatest diligence on their part could not have discovered them, for they were secretly conducted, and the books contained nothing calculated to disclose them. Yet any fine imposed upon the accused corporation had to fall upon the new stockholders, who were absolutely innocent men, and the prosecution resulted in that way, for, if we are correctly informed, the Government in view of the *hardship* of the case, consented to the infliction of a comparatively small fine.

Was justice advanced by the punishment of these innocent men? Was there any moral justification for thus penalizing them for past acts of which they never even knew? If not, and the statute thus permits that which is opposed to our ideas of conscience and moral principles, it is plainly void; for the Constitution confers on Congress no power to prescribe punishment which is not demanded by reason, or justified by moral necessity.

Punishment is inflicted primarily for the sake of justice. *Beccaria* says, of *Montesquieu's* statement that "every punishment which does not arise from absolute necessity is tyrannical," that "the proposition may be made more general, thus: Every act of authority of one man over another for which there is not an absolute necessity is tyrannical."

"The absolute theory of punishment * * * rests on the assumption that crime, as crime, must be punished; *punitur quia peccatum est.* But then comes the question, by whom? The state, as representing society at large, springs from a moral necessity, * * * and the state is not to be guided singly by expediency, or by the merely external purposes of society. It has an existence of its own to maintain, a conscience of its own to assert, moral principles to vindicate. Penal justice is, therefore, a distinctive prerogative of the state, to be exercised in the service and in the satisfaction of the duty of the state, and rests primarily on the *moral rightfulness of the punishment inflicted.* Penal discipline undoubtedly is expedient, both for the community and for the individual punished. But the jurisdiction is exercised, *not because it is expedient, but because it is right*" (*Wharton,* Cr. L. [10th ed.], vol. I, § 10).

"Nothing is more common than to hear those who have taken a superficial view of the Crown law charge it with numberless hardships and indistinguishing vigour: whereas, those who have more fully examined it, argue that it wants nothing to make it admired, for clemency and equity, as well as justice, but to be understood. It is agreeable to reason, that *even those who suffer by it cannot charge it with injustice,* so adapted to the common good as to suffer no folly to go unpunished which that requires to be restrained; and yet so tender of the unfortunates of human nature as never to refuse an indulgence where the safety of the public will bear it, it gives the prince no power, but of doing good, *and restrains the people from no liberty but of doing evil.*"

Hawkins Pl. C. (Author's preface).

SECOND.

(a) The difficulties of imputing crime to any person or aggregation of persons other than the real criminal or criminals is a legal and not a logical one.

The Government asserts: "The doctrine announced in these cases (civil actions *ex delicto*) is controlling also in criminal cases. There is certainly no greater *logical* difficulty in making a corporation responsible for the *criminal* intent of its agent than there is for making it responsible for his malice. In both cases the responsibility arises out of *public* policy. In both cases the responsibility is satisfied out of corporate funds. It is even more appropriate that the *compensation* exacted for this corporate responsibility should be paid to the State as *parens patriæ*, as in the case of a *crime*, than that *it* should be paid, as in the case of punitive damages, to a private individual[25]" (p. 31, Brief for the Government). Thus the Government supports its main contention that the fourth clause of the Elkins Act is "merely the *statutory* enactment of a rule of law already applied by this court in establishing liability of a corporation for the willful wrong of its agents" (Point Three, p. 28, Brief for the Government).

Let us analyze this statement. The first thing that we notice is that the question is not whether there is any merely *logical* difficulty, but whether there is any *legal* difficulty in the way of the conclusion, and the expression legal difficulty includes *constitutional* difficulty. In the second place, and in the next sentence, the Government states that, in civil actions, the rule that makes the master responsible for his servants' acts "arises out of public policy." So that even in those actions we are not in the forum of mere logic, but of expediency, or public policy. The third sentence assumes that punishment inflicted by sentence of the court, because

of a verdict of guilty against the accused, is *"compensation* exacted for this corporate responsibility." This is a novel doctrine in this court. When the agent is punished by imprisonment, as he may be, and the corporation is punished by a fine, each for the act of the agent and for that alone, is the latter part of the sentence "compensation" and only the former part "punishment"? For what and to whom is there ever compensation in the eye of the criminal law?

The true standard by which to test the soundness of the Government's contention will be found not in the rules of logic, but in the principles of criminal jurisprudence and in those great safeguards of liberty, some of which find explicit expression in the Constitution, and some of which underlie every free government.

When the Government brings a civil action to recover a penalty from one who has imported an alien under a contract to perform labor, there is no *logical* difficulty in applying to *that* civil action the rule which enables either party to call the other as a witness. This court, however, reversed a judgment because the Government had examined the defendant against his protest. Civil action though it was, the Government was seeking to recover a penalty for a violation of law, and the defendant could not lawfully be compelled to testify against himself.

That was the case of *Lees v. United States,* 150 U. S., 476.

In certain civil actions, a judgment against a person other than the defendant may be made evidence of the existence of a debt, for which the defendant is secondarily liable. When one stands accused of receiving stolen postage stamps, knowing them to have been stolen, what mere *logical* difficulty is there in applying the same doctrine in the criminal action, merely to the extent of making the record of conviction of the original thief, proof of the fact of the original theft, and requiring the Government to prove the charge that the accused received the stolen stamps with guilty knowledge? This court, however, held unconstitutional the

act of Congress which provided that such should be the legal effect of such a judgment. The accused was entitled to be confronted with the witnesses against him. That was the case of *Kirby v. United States,* 174 U. S., 47.

In civil actions, one party may call upon the other to produce a document on the trial, and, in a proper case, introduce secondary evidence, if the document be not produced. There is no "*logical* difficulty" in extending that doctrine to criminal actions, but a judgment of conviction was reversed because that was done in a criminal action in the presence of the jury. The defendant could not, indirectly, be called upon to testify.

In certain civil actions, the proof of certain facts is sufficient to call upon the defendant to prove an *affirmative* defense, if he have one. There is no strictly "logical difficulty" in extending the doctrine to criminal actions.

This court, however, has said that the plea of not guilty is unlike a special plea in a civil action. "* * * Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty." That was the case of *Davis v. United States,* 160 U. S., 469, 485-6, 490, 493.

In another case, No. 285, argued herewith, the Government asserts (p. 21, Brief for the Government) that a "conclusive rule of evidence is to all intents and purposes a rule of substantive law. It conclusively creates rights and defines liabilities."

In the same case the Government states its contention broadly. The brief quotes the first section of the Elkins Act and then proceeds as follows: "By this provision of the Elkins law such misdemeanor of Guilford (Traffic Manager) is made the disdemeanor of the corporation" (p. 24, Brief for the Government). This the Government contended at the trial, that Congress, legitimately, might do, and, in that contention, the Government was sustained by the trial court.

On page 35 of the brief for the Government there is a suggestion that the court might apply in a criminal action the doctrine which goes by the name of the *"alter-ego"* doctrine. In certain cases a servant has been allowed to recover damages for injuries caused by the negligence of a superior servant, because the latter has been held to be the *alter ego* of the master. The question in criminal law is not whether a particular agent might lawfully have exercised the full "corporate power" in the making of contracts, but whether or not the *corporation* has been guilty of a crime. It is inconsistent with the principles of criminal law to make one person suffer for the acts of another merely because the latter is in the general employ of the former.

In the *Coal-Land Fraud Cases,* decided just as this case was going to argument, no one would think of holding the defendants liable except upon allegation and proof that the crime was the crime of the defendants, because it was done by their *procurement.*

Arson committed by the agent of the insured is not a defense to an action on the policy (*Leibelman v. Manchester Fire Ins. Co.,* 108 Ala., 180, 201; *Henderson v. Western M. & F. Ins. Co.,* 10 Rob. (La.), 164; *Plimsky v. Germania Ins. Co.,* 32 Fed., 47; *Midland Ins. Co. v. Smith,* L. R., 6 Q. B., 561).

(b) The Elkins Act applies to individuals as well as to corporations.

The statement in the brief for the Government that the Act is "limited only to corporation carriers, which were the only carriers in the legislative mind," finds no support in the Act itself, and it must, ordinarily, be difficult to determine what was "in the legislative mind" in any way except by reading the legislative language.

What did the legislature mean when, in the Act of 1887,

it provided that "when the carrier is a corporation" the agent alone should be liable?

If the plaintiff in error had been an individual plying a ferry, or running a stage-coach, or a line of canal boats, such as it appeared are running between New York and Detroit, one may conjecture how frivolous the Government would consider a demurrer interposed on the ground that an individual carrier was not within the scope of the Act!

There may or may not be individuals that own railways engaged in interstate commerce, but the reports of this court and other courts are full of cases in which individuals engaged as carriers in interstate commerce have sought the protection of the court on one ground or another.

In one of the cases cited for the Government (*Pharmaceutical Society v. London and Provincial Supply Asso'n*, L. R., 5 App. Cas., 857, 874) Lord Watson, in speaking "of what is called the intention of the legislature," said:

> "I find the greatest difficulty in making up my mind as to what it should be held to be. I think that the considerations of policy on either side are pretty evenly balanced—in fact, I should be almost inclined to hold that the considerations of policy rather preponderate in favor of the appellants' argument. But that is not enough. It is not enough for me to speculate as to what was in the mind of the framer of this statute, whether he had forgotten the fact that there were corporations which either were dealing, or might deal in poisonous drugs; or whether, having this in view, he framed this act for the purpose of subjecting them to certain disabilities."

(c) Even if the court did lay down correctly one general rule, the plaintiff in error was entitled to specific instructions, and where instructions to the jury are conflicting or misleading a new trial should be ordered.

It was the legal right of plaintiff in error to be instructed specifically. *Western Union Tel. Co. v. Morris,* 105 U. S., 49; *Coleman v. Second Ave. R. R. Co.,* 114 N. Y., 609.

The errors in the charge were not withdrawn and no one can say what rule the jury followed.

In *Chapman v. Erie Ry. Co.,* 55 N. Y., the court said:

> "To obviate an erroneous instruction upon a material point, it must be withdrawn in such explicit terms as to preclude the inference that the jury might have been influenced by it."

If the jury were told, as they were, that the Government was bound to show authority in Pomeroy, what were they told as to what *was* authority, and from *whom* it must come?

The most that can be said is that, if the instruction in general terms was correct, yet the other instructions and the refusals to instruct were inconsistent therewith, and, in that event, a new trial is due as a matter of right.

Bank of Metropolis v. New England Bk., 6 How., 212, 226.

Armour v. Russell, 114 Fed., 614.

As the court said, in the last case:

> "It is impossible to tell by which rule the jury was governed."

See also—

Deserant v. Cerillos Coal R. R. Co., 178 U. S., 409.

The truth is that the trial court, in the last analysis, refused to submit to the jury the question of fact of authority, and, in doing so, acted on the very ground which the Government now finds itself forced to assume. This is the statement of the Government's contention (p. 31, Brief for the Government).

After making citations of cases which hold a master liable, *civilites*, for the acts of his agents, the brief continues: *"The doctrine announced in these cases is controlling also upon criminal prosecution"* (p. 31, Brief for Government). That is the substantial question with which the court is now confronted. This is very different, of course, from the proposition that it may be *possible* "to fasten this species of knowledge upon a corporation" (*U. S. v. N. Y. Herald*, 159 Fed., 296).

In cases *civilite*, the master is liable without fastening upon him any knowledge, or any direct authority to commit the tort. Is there, then, no difference *criminalities*? The Government says there is none, and there we are at issue on the underlying question. The Government cites no authority.

The decision in *U. S. v. New York Herald Co.*, 159 Fed., 296, recognizes the difference between "the capacity for "knowledge and the *fact* of knowledge." "The first," it was held, "was a question of law, and must decide this demurrer." "The second," it was held, "is a mixed question of "law and fact and its answer will depend upon the *author-* "*ity* and corporate importance of the human beings respon- "sible to the corporation" for the acts set forth in the indictment.

The court pointed out that "if by a corporate act (*e. g.*, a vote of the board of directors)" the corporate act was done, knowledge would be "chargeable against the corporation."

Plainly, this decision is no authority for the Government's contention that a master is liable *criminalite* for the unauthorized acts of his servant.

Even when sued *civiliter* for punitive damages, because of the wanton act of his servant, the master is not liable, as matter of law, simply because the actor in committing the wrong was, at the time, in his employ. This court, in one of the cases cited by the Government, held that some proof of authority, or participation, by the defendant must be shown.

There has been a uniform course of decisions to the effect that "for acts done by the agents of the corporation, either "*in contractu* or *in delicto*, in the course of its business and "of their employment, the *corporation* is *responsible as an* "*individual is responsible under similar circumstances.*"

P. W. & B. R. R. Co. v. Quigley, 21 How., 202, 210, 213, 214.

Followed *L. S. & M. S. Hy. Co. v. Prentice*, 147 U. S., 101, 112.

Washington Gas Light Co. v. Lansden, 172 *id.*, 534, 544.

In *Denver & Rio Grande Ry. Co. v. Harris*, 122 U. S., 597, 610, the court used the very expression which plaintiff in error used in its requests to charge which were directed to the point that the Government must give *some* proof of *some* authority or *some* knowledge on the part of those who "controlled the corporate action." In that case the court sustained a judgment for punitive damages *civiliter*, of course, because, and only because, the "corporation, by its *controlling officers*" did the act for which it was sued.

It would seem that counsel for the Government are almost ready to admit that the question is only whether, "when reasonably construed," the statute be not valid (p. 35, Brief for the Government). Of course, it is *much more important to save the statute than it is to save the judgment.* If it be true, as said by them (p. 34), that the "*penal* provisions of the Interstate Commerce and Elkins law are, at bottom, merely limitations upon the right of *contract* of the carrier

in respect to freights," there was a wide divergence from that view at the trial. It is said (on the same page) that those provisions "merely result in making the corporation respon-" sible for his failure to obey the limitations which Congress " lawfully imposes on the sphere of his contract when that " corporation is already responsible for his acts throughout " the entire sphere."

Bury it as deeply as they may, in a mass of words, the fact remains that the statute has been construed to make his crime the crime of the corporation, and for no other reason than this, that, having authority to a lawful act, he did an unlawful act.

If it were true, as stated (p. 14, Brief for the Government), that "if punishment for such payments * * * can be administered only on proving authorization from the president, or directors, 'no railway corporation can ever be legally punished for such payments,'" that would be no good reason for destroying fundamental safeguards guaranteed by the constitution. (*U. S. v. L. & N. R. R. Co.*, 157 Fed., 979.) The same could be said of any large business which, necessarily, is conducted through many agents of different degree of authority.

It is not true, however. The Interstate Commerce Commission has ample power to compel any officer of a corporation to disclose the fact.

Interstate Com. Com. v. Reichman, 145 Fed., 235.

The corporation can be compelled to produce any book or document before a grand jury.

Hale v. Henkel, 201 U. S., 43.
Nelson v. United States, Ibid., 92.

Respectfully submitted,

AUSTEN G. FOX,
JOHN D. LINDSAY,
ALBERT H. HARRIS,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE NEW YORK CENTRAL AND HUDSON RIVER RAIL ROAD COMPANY, Plaintiff-in-Error, AGAINST THE UNITED STATES, Defendant-in-Error.	No. 57.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

Statement.

This case comes up on a writ of error, after conviction of the plaintiff-in-error, and its Assistant Traffic Manager, Fred L. Pomeroy, upon an indictment charging them with the payment of six rebates to The American Sugar Refining Company, and certain others, upon shipments of sugar from New York City to Detroit, Michigan.

The Indictment.

The indictment was filed on May 4, 1906. It contained seven counts and charged as defendants, The New York Central and Hudson River Rail Road Com-

pany, its General Traffic Manager, Nathan Guilford, and its Assistant Traffic Manager, Fred L. Pomeroy. When the case came to trial, as to Guilford the indictment was severed by reason of his illness.

The first count of the indictment which charged the defendants with the offense of *offering* a rebate on April 26, 1904, was withdrawn by the District Attorney from the jury. Each of the remaining counts is in substantially the same form. Each charges the defendants with the payment of a separate rebate, each payment being made upon a different date and with respect to different shipments made during different months.

Thus the second count after setting out the various formal averments showing the establishment of the interstate through line in question from New York to Detroit and the establishment, filing and publication of the lawful tariff upon sugar over it, fixing the rate as twenty-three cents per hundred pounds, and after describing the business of the shippers The American Sugar Refining Company and The American Sugar Refining Company of New York and of the consignees, W. H. Edgar and Son, charges that on the 26th day of April, 1904, the defendants, the railroad company, Guilford and Pomeroy, entered into an unlawful agreement and arrangement with certain agents of the said shippers and consignees, whereby it was agreed that in the event of any sugars being shipped over the said line and of the full tariff rates being paid thereon, the railroad company would give a rebate of five cents for each one hundred pounds so shipped to be refunded from the lawful amounts paid as aforesaid, thereby reducing the said tariff by that amount for each one hundred pounds. The count then charges that during the months of April and May of the same year, certain consignments of sugar were made (the dates of shipment, numbers of way-bills and amount of sugar being specified) and the regular tariff rates were duly paid thereon; that pursuant to said agreement, on July 14th of the same year a claim for

$1,524.99, rebate and concession in respect to such sugars was presented by the aforesaid agents of the shippers and consignees, and that on the 31st day of August of the same year, the three defendants paid to "Lowell M. Palmer as agent of and for the benefit of" the said shippers and consignees, by way of rebate and concession in respect to the transportation of the said sugars under the said unlawful agreement and arrangement the said sum of $1,524.99.

As above stated, each of the remaining counts are in substantially the same form as the second count, the only difference being that the sixth count alleges with reference to shipments made during June, 1904, that the lawful rate was twenty-one cents per one hundred pounds and the amount of rebate agreed to and paid three cents per one hundred pounds.

The dates of shipment, of filing of claim, and the payment and amount of rebates in the respective counts are as follows:

SECOND COUNT.

Shipments made during April and May, 1904.
Claim filed July 14, 1904.
Rebate paid August 31, 1904 ..... $1,524.99

THIRD COUNT.

Shipments made during July and August, 1904.
Claims filed August 24, 1904 for July shipments, and September 23 for August shipments, respectively.
Rebate paid October 29, 1904..... $2,474.54

FOURTH COUNT.

Shipments made during September, 1904.
Claim filed October 20, 1904.
Rebate paid November 23, 1904 ..... $2,117.19

FIFTH COUNT:

Shipments made during October, 1904.
Claim filed November 17th, 1904.
Rebate paid December 29, 1904..... $1,971.44

SIXTH COUNT:

Shipments made during June, 1904 (Tariff rate, 21 cents; rebate, three cents).
Claim filed August 15, 1904.
Rebate paid September 14, 1904.....$539.40

SEVENTH COUNT:

Shipments made during April and May, 1904.
Claim filed July 14, 1904.
Rebate paid September 20, 1904.....$285.71

After the demurrers had been overruled the defendants were brought to trial on October 15, 1906, and the jury found a verdict of guilty against both of the defendants upon each of the six counts submitted. The court thereupon sentenced the defendant Pomeroy to pay a fine of $1,000 upon each of the six counts, or $6,000 in all, and the defendant railroad company to pay a fine of $18,000 upon each of the six counts, or $108,000 in all.

Mr. Pomeroy died after sentence and during a stay of judgment and before having taken an appeal. Mr. Guilford died pending the indictment and before trial of his case.

The shipper, The American Sugar Refining Company and the consignees, members of the firm of W. H. Edgar & Son have since pleaded guilty to similar indictments charging them with receiving the rebates described in the foregoing indictment, have been sentenced and paid the fines imposed.

Facts Established at the Trial.

The case is remarkable for the flagrancy and lack of excuse by which the crime is shown to have been committed by the agents of the railroad company; for the methods systematically adopted in the offices of the railroad company to conceal the transaction and for the unimpeachable character of the evidence with

which each of these facts was finally established at the trial.

(a) The jurisdictional and formal facts as to the establishment of the through line by the defendant and its connecting carriers from New York to Detroit, the establishment, filing and publication of the lawful tariffs applicable to the shipments in question, and the shipments of the respective consignments of sugar, and the payment of the regular tariff rates thereon were established as alleged in the indictment by the admission of the defendants.

(b) It was further conceded that the defendant Guilford, as General Freight Traffic Manager, and the defendant Pomeroy, as Assistant Freight Traffic Manager,

> "were authorized to establish rates at which freight should be carried over the line of The New York Central and Hudson River Rail Road Company, and to unite with other companies in the establishment, filing and publishing of through rates" (fol. 63).

The witness Palmer further testified that on behalf of The American Sugar Company he consulted frequently with Guilford on the subject of rates over the New York Central and its auxiliary lines and that

> "his [Guilford's] decisions in regard to the rates were uniformly carried out" (fol. 73).

(c) It was further shown by witnesses that the sugar refining companies were engaged in refining sugars in Brooklyn and Jersey City and in selling through an office common to both companies their products throughout the country; that the firm of W. H. Edgar & Son in Detroit, was a concern to which such shipments were made (fol. 66); that these shipments were sent with the freight prepaid by

the refining companies (fol. 79, top p. 61); and that all instructions in regard to the roads over which the shipments should be routed and the rates of freight applicable to such shipments were received by the sales department from Lowell M. Palmer (fols. 66–68). Palmer was a director of one, if not both of the sugar refining companies (fol. 67), and maintained a regular office at which he, with the assistant Riley, acted as traffic manager of the sugar refining companies and handled their business of arranging with the different railroads the routes and rates over which the sugar should be shipped (fols. 67, 68).

(d) It will be noted that by thus selling all of their sugars with the rate prepaid by themselves and maintaining a recognized office for the purpose of handling their business with the railroads, the sugar refining companies kept themelves in a position most favorable to using their large business as a means of extorting favorable rates from the various competing carriers leading westward out of New York. The correspondence of April 11th and 26th, 1904, between Palmer, Guilford and Pomeroy mentions this advantage and shows how it was used.

On April 11, 1904, Palmer wrote to Guilford a letter marked "personal and confidential" in which he requested an 18 cent all rail special rate from New York to Detroit for the benefit of the Edgar business (Exhibit 20, p. 91). Careful study of this letter is well worth while. It incidentally exemplifies and records most of the evils supposed to inhere in the system of secret rates and discrimination.

1. It reveals the large shipper tempting the carrier to depart from its tariff and give a secret rate by promising to the carrier all of the business involved. Palmer says:

> "I think, if we could arrange to give him [Edgar] a net rate all rail, of 18 cents per cwt. to

> Detroit and the same relative basis to other Michigan points, that we could make an arrangement with him whereby these shipments would be confined strictly to the New York Central and West Shore Fast Freight Lines throughout the entire year" (fol. 120).

2. It reveals the large shipper using this proposed secret transportation favor to attempt to crush out competition. W. H. Edgar & Son were evidently closely related to the sugar refining companies as regular agents or otherwise. Palmer says:

> "Edgar is in a very trying position in the state of Michigan, with the severe competition that he is experiencing with the Michigan beet sugars and with Arbuckle Brothers, and it seems quite certain, from the position he has taken, that something must be done for him in the way of rates this season" (fol. 120).

3. It was the anticipation of Congress in framing the Interstate Commerce law that the competition of the water routes of the country would serve as a natural method of regulating the general rates of railway carriers and preventing such rates, where such competition existed, from becoming excessive (Senate Report No. 46, 49th Cong., 1st Sess., p. 170). This letter shows how the operation of the economic law anticipated by Congress is thwarted by the device of secret rates. Palmer writes that Edgar threatened to use the cheap method of water transportation. Normally under the system of equal and public rates established by Congress in the Interstate Commerce laws, the New York Central Rail Road Company, in order to meet such competition, would be obliged to reduce its regular tariff rate to all customers. But with the device of a secret rate accomplished by a system of rebates they were enabled, as this letter shows, to maintain the high level of their regular rates

towards other customers, while they secured Edgar's traffic by means of favoritism. As Palmer says :

> " If some arrangement of this kind cannot be made, it is quite certain that Edgar's business will be put on the canal and rate arranged on it by himself beyond Buffalo. * * * As you can easily see, this is a matter of the most vital importance, not only to us, but to the railroad companies, and I sincerely trust that you will see your way clear to giving us authority to make such an arrangement with Edgar as will confine his business to the all-rail route " (fols. 120, 121).

(e) On April 26th, 1904, Pomeroy replies to this letter with another marked " Personal and confidential," in which he agrees to grant this secret rate. The vital clause is as follows :

> " This is to advise that, taking effect immediately, we will undertake to handle Edgar's shipments for Detroit, and such shipments [as] are to be reforwarded from there to points on the Michigan Central R. R. at a rate of 18 (eighteen) cents per 100 lbs., New York to Detroit all-rail, *shipments to be billed at tariff rates and refund made by voucher* " (fol. 60).

The court will note well that none of the parties to this criminal arrangement were under any delusion as to its propriety or justification. There was no pre-existing *bona fide* contract with the shipper as in the *Armour* case (209 U. S., 56) to give color to the claim of fair play. There was no ignorance of the lawful tariff on the part of either writer as claimed in the Standard Oil case. The terms of the letters are postulated upon the existence of the lawful rate and record an intention to violate that rate. Thus the shipments are to be billed at the tariff rates and the concession is to be granted in a way which

will preserve its secrecy. Pomeroy says further in his letter:

> "The question as to Howell's being advised of this *private* arrangement with Edgar rests in abeyance until the writer can have a personal interview with you regarding same" (fol. 60).

The entire correspondence breathes secrecy and deceit.

(*f*) But further, in view of the main argument of the plaintiff in error, it is to be specially noted that both Palmer and Pomeroy expressly address themselves to a matter within the scope of Pomeroy's official functions and avowedly for the benefit of his corporation, the railroad company. It is not a matter in which Pomeroy has any private interest. It is not even a matter in which he gratuitously engages, stepping outside of his official functions for the purpose. On the contrary, he engages to make a rate on behalf of his corporation for the purpose of saving some valuable traffic for that corporation and his letter winds up with a statement of the consideration to be received by his company in return for the rate. He says:

> "As advised over the 'phone, I think it would be well to confine this arrangement to Edgar's traffic, as outlined above, leaving his traffic that is going to points on the Grand Trunk, Pere Marquette and G. R. & I. Roads to move via such lines as he may elect, *with the understanding that where he can favor either the West Shore or this company, as far as the haulage to Buffalo is concerned, he will undertake to do so*" (fol. 60).

(*g*) Thereafter this arrangement was carried out in such a way as to involve the connivance and co-operation of a large number of controlling agents of the defendant railroad company and with the utmost precaution to prevent the public or any competitors from learning of it.

1. The shipments having been made and the regular tariff rates paid during the month, at the close thereof Palmer's clerk, Leeming, would make up a claim on the basis of the agreed 5 cents per 100 pounds. (fol. 80.)*

2. These claims would be sent by Palmer to Pomeroy and then by Pomeroy to William F. Wilson (General Manager of The New York Central and Fast Freight Lines), in Buffalo, for payment. Wilson would then send back to Pomeroy, not one of the regular checks with which ordinary claims in respect of freight were paid, but a draft purchased at the Bank of Buffalo for the amount of the claim (fol. 78). Pomeroy would then send this draft to Palmer and obtain his receipt. All of the correspondence was marked personal. In order to make it clear we give in full the correspondence relating to one of the claims (Second Count) as shown by the exhibits.

EXHIBIT 21. PAGE 92.

Office of Lowell M. Palmer, 184 Front St.
Personal.

NEW YORK, July 14, 1904.

MR. F. L. POMEROY, F. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: Referring to your favors of June 22nd, and 23rd: I beg to advise that our Claims Nos. 36209 and 36251 have been cancelled on our records, and to take their place I now enclose our claims as follows:

Our No. 36476, Merchants Despatch ..... $ 285.71
Our No. 36476–A North Shore despatch 1,524.99

---

*During the month of June the regular tariff rate was temporarily lowered from 33 cents to 21 cents. A claim for a 5 cent rebate during that month was subsequently corrected to a 3 cent basis and payment made on the latter basis (fol. 81. Also Exhibit 37, fol. 129).

I believe these claims are now made up, in accordance with your request, and I would thank you to put them through for prompt adjustment.

Yours very truly,

LOWELL M. PALMER,

Enc. Per RILEY.

EXHIBIT 22. PAGE 92.

Personal A. McM. "P."

JULY 16, 1904.

MR. W. F. WILSON, General Manager, N. Y. C. & W. S. F. F. Lines, Buffalo, N. Y.

DEAR SIR: I hand you herewith claim of Lowell M. Palmer, his No. 36476-A for $1,524.99 covering shipment of sugar consigned to W. H. Edgar, Detroit, via the N. S. D.

Please arrange to reduce the charges on these shipments to basis of 18c. per 100 lbs. New York to Detroit, prorating on basis of earnings between the N. Y. C. and M. C. roads.

Yours truly,

Enc. F. L. POMEROY,

Freight Traffic Manager.

EXHIBIT 23. PAGE 93.

Personal. A.McM.

AUG. 30, 1904.

MR. T. P. RILEY, c/o L. M. Palmer, 184 Front St. N. Y.

DEAR SIR: I hand you herewith draft for $1524.99 in favor of L. M. Palmer covering your claim No. 36476-A. Kindly sign enclosed receipt and return to me promptly.

Yours truly,

F. L. POMEROY,

Freight Traffic Manager.

EXHIBIT 7. PAGE 85.

Bank of Buffalo. No. A28964.

BUFFALO, N. Y., Aug. 23, 1904. $1524.99.

CHEMICAL NATIONAL BANK, NEW YORK CITY.

Pay to the order of L. M. Palmer, fifteen hundred and twenty-four and 99/100 dollars.

Not over two thousand.

J. L. DANIELS,
Cashier.
By H. J. DUNN.

EXHIBIT 24. PAGE 93.

Personal. P.

NEW YORK, Sept. 1st, 1906.

MR. W. F. WILSON, Buffalo, N. Y.

DEAR SIR: Your letter August 23rd. I return herewith receipt for $1524.99 duly signed by Mr. L. M. Palmer.

F. L. POMEROY.

U. S.

3. The system by which the claims were handled within Wilson's office is also significant. This was the office which handled all claims against the fast freight lines of the New York Central and its affiliated companies (fol. 73).

Wilson admitted that the claims coming into his office were divided into two classes according to the routine in which they were handled. One class consisted of the claims for loss and damage, switching and terminal relations, etc. These claims passed through the hands of Presinger, the chief clerk, were vouchered and then passed over to the custody of the Central Clearing House in the same building (fols. 73–74). Such claims would then be paid by Board-

man, the cashier, by checks regularly drawn from regular check books to the order of the claimant (fol. 78). And the transaction would be posted by the general bookkeeping department (fol. 78). Such claims came direct to the cashier from the General Bookkeeper (fol. 78). These claims evidently represented all of the normal business claims against this freight department of the defendant company and were very much larger in volume that the class of claims to be now referred to (fol. 77). There was no evidence that any of these claims had ever been destroyed after they passed over from Wilson to the Central Clearing House.

In addition to these, there was another class of claims handled by Wilson's office. These latter were comparatively few as compared with the claims that went to the Central Clearing House. They were handled by a clerk of the name of John S. Embleton in Wilson's office. Wilson admitted that these claims were of the class of the Palmer claims numbers 37,100 and 36,876, which in plain language means claims for rebates (fol. 76, p. 59). Instead of going over to the Central Clearing House and being entered upon the regular books, these claims remained in the office of Wilson and were entered by Embleton in a book kept by him (fol. 75). Instead of being paid by regular checks drawn to the order of the claimant, they were paid by cashier's draft purchased from the Bank of Buffalo (fol. 78). Embleton would request Boardman, the cashier, to buy a draft for the amount of the claim, and this written request was apparently the only voucher for the payment (fol. 78). Embleton's initials appear in the correspondence between Wilson and Pomeroy concerning these claims (fols. 85-87; Exhibits 13, 14, 15, 16, 17).

Every three months these Embleton claims in the office of Wilson were audited and then destroyed (fol. 74), ostensibly for the purpose of making room, though they were much smaller in number than the others of which there is no record of destruction (fol. 77).

In March, 1906, Wilson was called before the grand jury in regard to this case (fol. 75), and in March, 1906, Embleton went away sick to Texas and had not returned up to the date of the trial. The book in which he kept a record of these claims had disappeared and not been seen since his departure (fol. 76).

4. It was conceded at the trial that the various cashier's drafts sent in payment of these claims were liquidated out of the funds of the defendant corporation.

Outline of Argument.

The record, as thus briefly summarized in this statement shows that the unlawful arrangement was in the first place planned by the two chief officers to whom had been delegated power to make the rates charged by the Railroad Company, and who habitually exercised that power. When received by them the illegal claims (the forms under which the rebates were disguised) were sent by these officers to the regular head of the Bureau paying all freight claims of the corporation. They were then handled in a way which at once stamped them as secret yet regular and customary. They were then paid out of the corporate treasury and were finally audited and passed by the regular auditors of the corporation.

As modern railway corporations are organized the directors and presidents do not authorize or audit specific claims incurred in the course of their company's business. That work is invariably delegated to freight traffic managers, claim agents and auditors.

If punishment for such payments when prohibited by law can be administered only on proving authorization from the president or directors no railway corporation can ever be legally punished for such payments. But, on the other hand, if a railroad corporation may be made criminally responsible for the acts

of its officers or agents, to whom have been delegated power to control its corporate action *within the sphere represented by the transaction* then no case can more completely show ground for liability than the case at bar.

In urging the corporate liability in the present case the Government will maintain the following propositions :

FIRST. Under the commerce clause Congress has undoubted constitutional power to subject corporations to criminal prosecution and punishment to enforce more effectually the regulations regarding interstate commerce.

SECOND. This power was exercised in the passage of the Elkins Law which only applies to, or, at all events, is constitutional when only applied to corporate carriers.

THIRD. Congress has constitutional power to provide that a corporate common carrier shall be criminally liable for the acts of "any person acting for" such corporation, for acts "within the scope of his employment." Such a statute is merely declaratory of a rule of corporate liability firmly established by this Court.

FOURTH. The Elkins Law makes both the carrier corporation and its guilty agent cumulatively liable and permits their joinder and prosecution in one trial.

FIFTH. While the question is not properly raised in this case, Congress has undoubted power to punish both the carrier corporation and one of its guilty stockholders for the violation of "regulations of interstate commerce" enacted "within the acknowledged power of Congress under the Interstate Commerce clause." For the corporation and its constituent stockholders are distinct legal persons, separately responsi-

ble to the law and Congress may properly punish by separate punishment distinct offenders.

SIXTH. The whole contention of the plaintiff-in-error reduces itself to a plea of complete corporate immunity for public wrongs, and thus is an effort to revive a view of corporate liability unfounded in reason, disastrous in result and universally repudiated by the Courts.

SEVENTH. The plaintiff.in-error was properly charged and convicted for six separate offenses, for each of which a separate punishment was properly imposed.

EIGHTH. The indictment is free from formal defects and none of the other objections of the plaintiff-in-error is well taken.

The Statute.

The Elkins Law (32 Stat., 847) reads as follows:

> That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law shall be a

misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being here abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and comp'eted in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction

in the same manner as if the offence had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

POINT ONE.

Congress has power, in the exercise of its constitutional function of regulating commerce, to enact laws which subject corporations to criminal prosecution and punishment.

Our opponents have evidently been driven to the startling proposition of their First Point by the fact that this proposition necessarily underlies the other cardinal propositions of their brief. We do not deem it necessary to argue at length this first proposition. We shall discuss under later points some of the fallacies which seem to us to underlie their present argu-

ment. The indictability of a corporation for crime is a legal doctrine too well settled by authority to require at the present day argument in this Court.

1. It is sufficient to point out that at least nine convictions of corporations for criminal offenses have been brought to this Court within the last four years, and in most of those cases the judgments of convictions have been here affirmed. If the laws under which such corporations had been convicted were unconstitutional and void and if the members of such corporations had been deprived by those criminal judgments of their property without due process of law it would have been the duty of this court, even on its own motion, to set aside the judgments and dismiss the indictments.

Berea College vs. Commonwealth, 211 U. S. (decided November 9, 1908).
Armour Packing Co. vs. United States, 209 U. S., 56.
Swift & Co. vs. United States, 209 U. S., 56.
Chicago, Burlington & Quincy Rway. Co. vs. United States, 209 U. S., 90.
Great Northern Rway. Co. vs. United States, 208 U. S., 452.
Eastern Dredging Company vs. United States, 206 U. S., 246.
Bay State Dredging Company vs. United States, 206 U. S., 246.
Union Bridge Co. vs. United States, 204 U. S., 364.
Hackfeld & Co. vs. United States, 197 U. S., 442.

Furthermore, the important decision rendered by this Court in *Hale vs. Henkel*, 201 U. S., 43, that the constitutional immunity against self-crimination does not shield a corporation was pointless and unnecessary if a corporation, as now contended, enjoys complete constitutional immunity from all criminal prosecution.

2. Nor do we deem it necessary to argue the right of Congress specifically to exercise its power over in-

terstate commerce by the use of criminal penalties. As was said by this Court:

> "There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of the powers with which it is intrusted. * * *
>
> "Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States."
>
> *United States vs. Fox*, 95 U. S., 670, 672.
> Also, *United States vs. Hall*, 98 U. S., 357.

> "By virtue of its dominion over interstate commerce Congress has power * * * over corporations engaged in that commerce."
>
> McKenna, J., in *Hale vs. Henkel*, 201 U. S., p. 82.

> "The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by the Act of Congress."
>
> *Hale vs. Henkel*, 201 U. S., 43, 75.

3. Such a position as that contended for by our opponents would not only invalidate those wholesome provisions of the Elkins Law, by which the former impotent Interstate Commerce Act was vivified, but it would also render void a large number of other important federal statutes in which provisions for the criminal liability of corporations occur. Among such instances, the Court will remember the Railroad Safety Appliance Act, the Sherman Anti-Trust Law, the Pure Food and Drugs Law, the Lottery Law, the Postal Violation Law, and, in fact, all statutes under which, since the Statutory Construction Law of 1871

(Act Feb. 25, 1871, Sect. 1 R. S. U. S), corporations are now being held criminally responsible.

Furthermore, if our opponent's astonishing argument to the effect that criminal punishment of a corporation deprives the stockholders of their property without "due process of law" (Brief of Plaintiff-in-Error, bottom p. 37 and top p. 38) were well founded, it would result that under the Fourteenth Amendment every state statute making corporations criminally liable is in violation of the federal Constitution and every one of the innumerable convictions which are a part of the well-established policy of all of our states, could be set aside on appeal to this Court. For "due process of law" has been given the same meaning in the Fourteenth as in the Fifth Amendment when the question has arisen (*French vs. Barber Asphalt Paving Co.*, 181 U. S. 324).

It is fair to call attention to these drastic results as indicative of the temerity with which our opponents have taken up their fundamental position which logically underlies their appeal.

4. What an outcast and rejected doctrine the plaintiff-in-error now urges on this Court is evidenced by the quotation approvingly cited from *State vs. Great Work Mills Co.*, 20 Me., 41, as authority for the proposition that a corporation can commit no crime. This case, after being repudiated in Vermont and New Jersey, was expressly overruled twenty-five years ago, by the Court which enunciated it (*State vs. Portland*, 74 Me., 268, 273). And the variety and large number of offenses for which corporations have been held criminally liable crushingly demonstrates the fanciful and archaic contention of the plaintiff-in-error;

State vs. Morris R'way Co., 23 N. J. Law, 360 (Creating a nuisance in erecting and building a public highway).

State vs. Passaic Co. Society, 54 N. J. Law, 260 (Keeping a disorderly house).

United States vs. Kelso, 86 Fed. Rep., 304 (Violation of Eight-Hour Law).

United States vs. Alaska Packers' Association, 1 Alaska, 217 (Taking salmon unlawfully).

The State vs. The B. & O. R. R. Co., 15 W. Va., 362 (For Sabbath breaking).

Commonwealth vs. Pulaski Association, 92 Ky., 197 (Permitting gaming on its fair grounds).

State vs. Atchison, 3 Lea (Tenn.), 729 (Criminal libel).

State vs. Natl. Bank, 2 So. Dak., 568 (For taking usurious rates of interest).

United States vs. Van Schaick, 134 Fed. Rep., 592, 602 (Homicide, occasioned by an inadequate supply of life preservers).

United States vs. McAndrews & Forbes Co., 149 Fed Rep., 836 (Violating Sherman Anti-Trust Law against conspiracy in restraint of trade).

United States vs. New York Herald Co., 159 Fed., 296 (Sending obscene matter through the mail).

POINT TWO.

The case at bar involves the constitutionality of the last paragraph of Section One of the Elkins Law only in so far as it applies to corporate carriers.

This paragraph reads as follows:

> "In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. When-

ever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, *its* officers or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

The first and main argument of our opponents under their Second Point is based upon the assumption that the foregoing provision applies to individual carriers as well as corporate carriers. They argue that this provision "makes the crime of A the crime of B as a matter of law" and that it is not "due process of law" because it deprives B of the fundamental principle that the accused is presumably innocent until he is proved beyond a reasonable doubt to be guilty (Brief of Plaintiff-in-Error, pp. 53-55). They then argue that the statute, being unconstitutional as to an individual carrier and incapable of separation as to a corporate carrier, is void *in toto*. It is unnecessary to discuss the constitutionality of this statute in relation to individuals, because each of their other propositions is clearly unfounded.

A.

The recent Berea College Case disposes of the whole contention.

The decision of this Court in *Berea College vs. Commonwealth*, decided November 9, 1908, completely disposes of the main contention in Point Two of our opponents' brief that the Elkins Law is unconstitutional, because it applies to individual cariers as well as cor-

porate carriers. In that case this Court has just held that a statute making it unlawful "for any person, corporation or association of persons" to maintain a college for the education of white and black pupils is constitutional and valid when applied to a corporation irrespective of its validity as applied to persons. Speaking through Mr. Justice BREWER this Court said:

> "Such a statute may conflict with the federal constitution in denying to individuals powers which they may rightfully exercise, yet at the same time be valid as to a corporation created by the statute.
>
> * * * * * *
>
> "It is unnecessary for us to consider anything more than the question of its validity as applied to corporations."

This decision is precisely the case before the Court, assuming that our opponents contention as to the constitutionality of the Elkins Law towards an individual carrier were well-founded.

B.

As a matter of fact, this paragraph of the Elkins Law does not apply to individual carriers.

This is proven conclusively both by the history and the language of the entire Section 1 of the Elkins Law, as well as of this provision. The main purpose of the enactment of the Elkins Law was to make corporations criminally responsible where under the old law it had been held that only the agents were so responsible. The constantly repeated recommendations of the Interstate Commerce Commission in response to which the Elkins Law was enacted, lay stress on no other point as often as on this.

In its report of January 17, 1902, immediately before

the enactment of the Elkins Law, the Commission said:

> "It was undoubtedly the intent of the tenth section of the act to impose a penalty upon the corporation itself. Under its peculiar phraseology it has, however, been judicially determined that the corporation is not liable. The agent alone can be punished. Now, the object of rate cutting is to get business and make money. The corporation, if anyone, profits by the illegal act. The corporation is the real offender and ought certainly to pay the penalty as well as its officer. It is anomalous and unjust that the representative or employee only should be liable to prosecution, while the real offender, the corporation, which is the principal and beneficiary in the transaction, is not subject to punishment. If every illegal act of that character subjected the carrier to a substantial forfeiture, so that the money result of the transaction was likely to be the other way, the inducement to commit such offenses would be greatly diminished" (p. 7).

See, also,

6th An. Rep. Int. Com. Com. (1892), 39.
7th An. Rep. Int. Com. Com. (1893), 78.
9th An. Rep. Int. Com. Com. (1895), 23.
10th An. Rep. Int. Com. Com. (1896), 115.

Here it should be remembered that the original Interstate Commerce Act and the Elkins Law were both limited to railway carriers, and from the report of the Cullom Senate Committee (1885), and the first Annual Report of the Interstate Commerce Commission, it is clear that neither of those bodies were concerned with railway carriers other than corporations (Senate Report No. 46, Forty-ninth Congress, 1st Session, p. 10; First Annual Report Int. Com. Com., p. 1).

The history of the Elkins Act and an examination of the provisions relating solely to carriers clearly show that it was passed in view of the existing

fact that all interstate carriers subject to the act were corporate carriers. Thus, the first two penal provisions of the Elkins Law expressly describes the carrier to which they apply as "corporation common carriers." The second clause, the vital provision penalizing failure to observe the public tariff, limits the punishment to corporations. It is incredible that Congress in its effort to stamp out rebating and procure equality of rates, would have limited this provision to corporate carriers if it had deemed that there were any other carriers within the purview of the Act.* When we reach the concluding paragraph of the First Section, which again relates wholly to carriers, it must be construed *in pari materia* with the other provisions which exclusively relate to carriers as applying wholly to "corporation common carriers."

And the concluding paragraph taken by itself clearly indicates that the provisions of that paragraph are limited to corporate carriers The two sentences contained in that paragraph are of course *in pari materia.* They are both provisions containing rules of statutory construction of the preceding portion of the section, and historically both were suggested by the Interstate Commerce Commission in its Eleventh Annual Report of 1897. (See Government Brief in No. 285, Point One.)

Therefore, the use of the word "carrier" in the first sentence of the last paragraph is evidently the same as its use in the second, and the second sentence is evidently intended to refer only to a corporation carrier by the use of the pronoun "*its*" in defining the officers and agents of such a carrier. We submit,

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* The third penal provision, relating to rebates, it is true, includes others than corporations. This is necessarily so, because this provision affects shippers as well as carriers. And it is also the provision which is intended to reach and punish the agents of both carriers and shippers. Therefore, by its context, the word "person" here, unlike in other provisions, is applicable to both corporations and natural persons.

therefore, that instead of this paragraph being a general and inapplicable provision of the law relating to and embracing imaginary and non-existent individual common carriers (which is the basic contention of Point Two of our opponents brief) it is, on the contrary, shown by its history and the language to be limited only to corporation common carriers, which were the only carriers in the legislative mind. And that our construction is the one which our friends themselves placed upon it on the trial below, is evidenced by this assignment of error:

> "The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier *corporation* shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (Assignment of Error, 93, p. 109).

C.

In any event, the first paragraph of the Elkins Law which contains similar provisions and provisions upon which the judge's rulings could be sustained is expressly limited to "corporation common carriers."

Even if our friends should succeed in persuading the Court that the final paragraph of the Elkins Law is unconstitutional and void it would avail them nothing. Substantially similar provisions occur in the opening paragraph, which is expressly limited to corporation common carriers, and upon those provisions the rulings of the trial court could well stand.

POINT THREE.

The so-called fourth clause of Section 1 of the Elkins Act which declares that in construing and enforcing the provisions of that section, "the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person," is not only constitutional but is merely the statutory enactment of a rule of law already applied by this court in establishing liability of a corporation for the wilful wrong of its agents.

As we have just pointed out, the main argument of the Second Point of our opponents' brief is based upon the assumption that the foregoing clause is unconstitutional in that it applies to individual carriers, a position which is disposed of by the *Berea College* case. They then argue briefly, that even if the clause were limited to corporations, it would still be unconstitutional because it discriminates between corporations and natural persons (Brief, p. 61). This argument requires merely a word in reply.

1. There is a vital difference between corporations and natural persons in their respective relation to their agents and in the responsibility of either for the acts of those agents. This difference was clearly pointed out by the Judge below:

> "The cases which have been cited of an individual master and individual servant are essentially different. The argument is very weighty in those cases, but [and] where the individual ser-

vant is guilty of the criminal act in the course of his master's business and there is no evidence whatever that the master consented to it or had anything to do with it, the general principle of law would be that a statute making the master criminally punishable in such a case as that was invalid. But a corporation is an essentially distinct entity. *It only acts by its officers and there is no such separation between the corporation and its officers,* although they discharge duties which make them for certain purposes under the civil law servants and the relation between them is that of master and servant under the civil law, yet the relation is essentially different from that which would be the relation between an individual master and an individual servant, and I think it is entirely competent for Congress to provide that a corporation shall be criminally liable for the acts of its agents which constitute crimes if it sees fit to do so" (fols. 56 and 57).

The statute, therefore, applies to all of the members of a similar class (corporations) and excludes from its application only a class (natural persons) which in respect to the subject matter of the statute are wholly different. Such a classification is perfectly constitutional.

Field vs. Barber Asphalt Pav. Co., 194 U. S., 618, 621.
Atchison Co. vs. Matthews, 174 U. S., 96, 104.
Dow vs. Beidelman, 125 U. S., 680.

Furthermore, it is a fact of such common knowledge that the class of individual railroad carriers in this country is practically non-existent that this Court may well take judicial notice of the fact. The history of the enactment of the Interstate Commerce Law and of this particular section of the Elkins Act, as we have already pointed out, is postulated upon that fact. The reports of the Committees upon which the legislation was framed, the debates of Congress,

and the reports of the Interstate Commerce Commission all unite in showing that the legislation, both of 1887 and of 1903, was aimed at corporate carriers because no others practically existed. Congress legislating with a view to existing conditions, dealt with the whole class to which the subject-matter applies. The discrimination, therefore, upon which our learned friends rely, is artificial and imaginary.

Michigan Central R. R. Co. vs. Powers, 201 U. S., 245 (sustaining a tax statute which treated as a separate class all railroad corporate property for purposes of taxation).

See, also, *Metropolitan Street Railway Co. vs. New York*, 199 U. S., 1, 47.

2. This Court has frequently held that a coporation could be held responsible for the wrongs committed by its agents, even where those wrongs necessarily involved malicious intent. The development of this doctrine *ex necessitate* was clearly pointed out by Mr. Justice MILLER:

> "The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract but are arbitrary exercises of power in the nature of torts, or are *quasi* criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."
>
> *Salt Lake City vs. Hollister*, 118 U. S., 256, 260.

In the cases involving punitive damages, where malice is a necessary ingredient of the offense, this court has held that the malice of the individual agent

could be " imputed " to the corporation for the purpose of holding it pecuniarily responsible for the wrong

> " A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. * * * A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. * * * No doubt, a corporation, like a neutral person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation."
>
> *Lake Shore & Michigan Southern Railway Company vs. Prentice*, 147 U.S., 101, 109-11; see also *Denver & Rio Grande Railway vs. Harris*, 122 U. S., 597.

The doctrine announced in these cases is controlling also upon criminal cases. There is certainly no greater logical difficulty in making a corporation responsible for the criminal intent of its agent than there is for making it responsible for his malice. In both cases the responsibility arises out of public policy. In both cases the responsibility is satisfied out of the corporate funds. It is even more appropriate that the compensation exacted for this corporate responsibility should be paid to the State as *parens patriæ*, as in the case of a crime, than that it should be paid, as in the case of punitive damages, to a private individual :

> " We think that a corporation may be liable criminally for certain offenses of which a specific

intent may be a necessary element. *There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.* * * * A corporation cannot be arrested and imprisoned in either civil or criminal proceedings but its property may be taken either as compensation for a private wrong or as punishment for a public wrong."

Telegram Co. vs. Commonwealth, 172 Mass., 294, 297.

Judge HOUGH, in the case quoted at length on pages 38 to 40 of our opponents' brief, expressed it as follows:

"It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest."

United States vs. McAndrews & Forbes Co., 149 Fed., 823, 836.

"To fasten this species of knowledge upon a corporation requires no other or different kind of legal inference than has long been used to justify punitive damages in cases of tort against an incorporated defendant. If a corporation can corporately know that an engineer is a habitual drunkard (Cleghorn v. N. Y. Central, etc., R. R. Co., 56 N. Y., 44; 15 Am. Rep., 375), it can even more surely know the ordinary contents of a newspaper the publication of which is its sole reason for existence."

United States vs. N. Y. Herald Co., 159 Fed., 296, 297 (Indictment for mailing obscene matter).

See, also, Lord BLACKBURN's opinion in Pharmaceutical Society vs. Provincial Supply Association, 5 App. Cas., 857, 869 (1880).

3. This is particularly true in a case like the one now before the Court, where the offense itself "does not involve turpitude or moral wrong." As this Court has interpreted the Elkins Law the only intent required on the part of the offender is "purposely doing a thing prohibited by statute."

Armour Packing Co. vs. United States, 209 U. S., 56, 85.

See, also, *Eastern Dredging Co. vs. United States*, 206 U. S., 246, 257.

It was not necessary in the case at bar to impute to the Railroad Company any such malice or willful wrongdoing as was involved in the *Prentice case, supra*, or the other punitive damage cases. If a rate lower than twenty-three cents per hundred pounds on freight transported from New York to Detroit was intentionally given at a time when the lawfully established tariff rate was twenty-three cents, a crime was committed. And it is no more difficult to impute to the corporation an intention, existing in the minds of the two officers "authorized to establish rates" for the corporation, to make a rate lower than the regular tariff, than it is to impute to it an intention to make a rate equal to the tariff rate, on which last intention any suit brought by the Railroad Company against its customers for freights must necessarily depend. If the difficulty of corporate mentality now insisted upon by its counsel were well founded, the New York Central Railroad Company could never maintain its rights of contract as carrier.

4. Thus this clause of the Elkins Act, instead of being an arbitrary and unconstitutional use of power by Congress, is merely a statute declaring and enacting in the case of this class of offenses the rules of law

which this court (no less subject than Congress to the "due process" limitation) have established in other corporate cases:

> "We do not mean that in order to render the company liable there must be some evidence of authority, expressed or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence *from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself.*"
>
> *Washington Gas Light Co. vs. Lansden*, 172 U. S., 534, 545.

Of course, the executive power of a modern railway corporation in matters pertaining to its ordinary railway business is not exercised by its higher officers and directorate. It is universally delegated to other officials and agents. These officials and agents, for the purposes of the transaction in question, exercise "all corporate powers." Their acts and decisions in contractual matters regularly bind and make responsible the corporation. The rates fixed by the freight traffic manager are regularly the rates at which the corporation is bound to carry the goods. The penal provisions of the Interstate Commerce and Elkins Law here considered are at bottom merely limitations upon the right of contract of the carrier in respect to freights. This provision of the Fourth Clause of Section 1, making the carrier responsible for the acts of its agent "acting for" the carrier and "acting within the scope of his employment" when applied to the general freight traffic manager, merely result in making the corporation responsible for his failure to obey the limitations which Congress lawfully imposes on the sphere of his conduct when that corporation is already responsible for his acts throughout the entire sphere.

Nor is there anything in the provisions of this Fourth clause which when properly construed by the courts will yield any more radical or more dangerous results in other cases than those shown by the facts of this case to be necessary and salutary. The very language of the provision defining the officer or agent as a "*person acting for*" the carrier and limiting the responsibility for acts "*within the scope of his employment*" show that it was clearly the intention of Congress to confine the effect of this law to cases where the *agent in effect was vested with the corporate powers as far as the transaction in question was concerned.* Before a corporation can be held liable under this clause the question of fact must always be determined whether the agent was, in the transaction in question, exercising the powers of the corporation, and the Court would always retain power to protect the corporation against liability in improper cases. The present attempt to distort the meaning of the provision by a strained and fanciful construction should not be permitted to nullify a statute, which when reasonably construed, is wise and proper and merely affirmative of well established principles of law.

5. Thus, our learned opponents' contention that the statute automatically makes the corporation responsible for *every* act of *every* agent is incorrect in law. The record also shows that the learned Judge below took no such view of the statute.

The Court expressly charged :

> "It is for the jury to say whether the corporation pays back a rebate intending to pay it as a rebate. It is for the jury to say whether it intended to violate the law or not." (Fol. 108.)

He also charged at the request of the defendant :

> "That the mere fact that letters by Pomeroy bore the letterhead of the New York Central and Hudson River Railroad Company was not of itself evidence of knowledge by those controlling the

corporate action of any unlawful act on the part of either Pomeroy or Guilford" (fol. 108.)

He also charged:

"That in order to justify a verdict of guilty against this defendant it is not enough for the Government to prove that the defendant Pomeroy offered to give or did give rebates on sugar carried by this defendant" (fol. 101). "I so charge: There might be rebates given for a legitimate purpose" (fol. 109).

And again:

"That in order to prove that this defendant corporation authorized the giving of rebates it is not enough for the Government to prove merely (that) the giving thereof by Guilford and Pomeroy, together with the fact that thereafter certain claims were presented and paid out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo" (fols. 101–102). I so charge. It might take place in an honest way" (fol. 109).

And again:

"That it is not for this defendant corporation to prove a negative *and show that it did not authorize the giving of rebates but it is for the Government to show such authority and to show it beyond a reasonable doubt*, and no unfavorable inference must be drawn against this defendant corporation because it called no witnesses" (fol. 109).

Finally, as complete disproval of the plaintiff-in-error's contention that the Judge below instructed the jury to the effect that the act of the agent automatically and necessarily made the corporation guilty, it appears that the Court expressly instructed the jury that they might find *either the agent or the corporation or both guilty* (fol. 97).

POINT FOUR.

The defendants were properly joined in the indictment, and the Elkins Law permitting such joinder is constitutional.

A.

A violation of the Elkins Act is capable of joint commission.

That the offense of departing from the published tariff and giving a rebate may, and, in fact, usually will be, committed by several persons in concert cannot be doubted, and is hardly disputed. The case at bar is an example of such joint commission of crime by Guilford and Pomeroy.

It is, of course, the general rule that where two or more persons join in the commission of an offense they may be jointly indicted.

United States vs. McGinnis, 26 Fed. Cas., 15,678.

State vs. Lehman, 182 Mo., 424 (with full collection of authorities).

22 Cyc., 373.

The offense is made by the statute a misdemeanor, and under the elementary rules of criminal law all persons procuring the commission of the offense or participating therein are principals.

B.

The Elkins Act expressly added the liability of a carrier corporation to that of its individual officers and agents.

1. This appears from the express language of the statute:

> "That anything done or omitted to be done by a corporation common carrier * * * which,

if done or omitted to be done by any director or officer thereof, or * * * agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall *also* be held to be a misdemeanor committed by such corporation, etc."

"In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case, be *also* deemed to be the act, omission, or failure of such carrier *as well as that of the person.*"

2. The history of these enactments also shows that this liability of the corporation was not substitutionary but cumulative. The officer or agent was already liable and Congress now charged also the principal. The sponsor of the Bill on the floor of the House said in support thereof in the brief debate which took place upon its enactment:

"In consonance and in harmony with the oft-repeated recommendation of the Interstate Commerce Commission, we propose what? To make the individual less culpable? No, the gentleman from Missouri to the contrary notwithstanding. * * * I say that there is no repeal from first to last in all this legislation. I say that there is no repeal of the present statute making culpable and responsible criminally the individual under the Interstate Commerce Law. But in addition we make the corporation liable criminally. *The subordinate is now under the law, and to that we add by this statute the culpability and criminality of the master, the corporation.*"

36 Cong., Rec. 2158.

The report of the Interstate Commerce Commission for 1903 contains a contemporaneous administrative

construction of the Elkins Law by the Commission, which says:

> "In the first place, the recent amendment makes the railway corporation itself liable to prosecution in all cases where its officers and agents are liable under the former law. Such officers and agents continue to be liable as heretofore, but this liability is now extended to the corporation which they represent."
>
> 17th An. Rep., Int. Com. Com. (1903), 8.

It is perfectly clear from these contemporaneous expressions of authoritative opinion that Congress intended by the Elkins Law to make both the individual and the corporation jointly and cumulatively and not merely alternatively liable.

3. In criminal prosecutions which have been brought under this statute since its enactment, it has been the common and constant practice to indict at the same time the officers and agents, and their master, the corporation. In no case, except the present, has that practice been challenged, so far as we are aware.

UNDER THE ELKINS ACT.

Northern District of Illinois:

United States vs. Chicago & Alton Ry. Co., John M. Faithorn and Fred A. Wann, December 13, 1905.

United States vs. Chicago, Burlington & Quincy Ry. Co., Darius Miller and Claude G. Burnham, December 29, 1905.

Western District of Missouri:

United States vs. Chicago & Alton Ry. Co., John M. Faithorn and Fred A. Wann, December 15, 1905.

District of Minnesota:

United States vs. C., St. P., M. & O. Ry. Co., H. M. Pearce, E. B. Ober and F. C. Gifford, November 8, 1906.

United States vs. Gt. No. Ry. Co., B. Campbell, W. W. Broughton, H. A. Kimball and D. G. Block, November 8, 1906.

United States vs. Gt. No. Ry. Co., B. Campbell, W. W. Broughton, H. A. Kimball and A. G. McGuire *et al.*, November 8, 1906.

United States vs. Gt. No. Ry. Co., W. W. Broughton, G. I. Sweeney *et al.*, November 8, 1906.

United States vs. Wis. Cent. Ry. Co., Burton Johnson and George T. Huey, November 8, 1906.

United States vs. Minn. & St. Louis R. R. Co., J. T. Kenny, November 8, 1906.

UNDER THE SHERMAN ACT.

Middle District of Tennessee:

United States vs. Virginia-Carolina Chemical Co., *et al.*, May 25, 1906.

District of Oklahoma:

United States vs. Chandler Ice and Cold Storage Plant and John W. Graves, September 19, 1906.

District of Arizona:

United States vs. Peoples Ice and Fuel Co. and L. B. Lount, October 23, 1906.

United States vs. Demund Lumber Co., T. W. Chamberlain Lumber Company, Valley Lumber Company, H. W. Ryder and H. P. Demund, October 23, 1906.

United States vs. Phœnix Wholesale Meat and Produce Co., P. J. Hurley and S. J. Tribolet, October 23, 1906.

District of Columbia:

United States vs. American Ice Company, Samuel A. Kimberly, George F. Hoover, Chapin-Saks Manufacturing Co., Arthur C. Chapin and Samuel Redman, July 12, 1906.

The point was expressly raised and decided in an indictment under the Sherman Law in the United States Circuit Court for the Southern District of New York. In that case two corporations, together with their respective presidents, were indicted under the Sherman Anti-Trust Law and demurred on the ground that the joinder was improper. The Court said:

"This is learnedly and fully treated by VAN BRUNT, J., in *People v. Clark* (O. & T.), 14 N. Y. Supp., 642, and I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment. This procedure has been followed in *People, etc. v. Detroit White Lead Works*, 82 Mich., 471, * * * and in *Overland Cotton Mills v. People, etc.*, 32 Colo., 263, * * * nor do I think the holding in the rebate case (*United States v. N. Y. C. & H. R. R., et al.*, lately decided in this Court, 146 Fed., 298), irrelevant to the present issue. The indictments in these cases were based upon those clauses of Section 1 of the Act of Feb. 19, 1903 ('Elkins Act'), * * * which declares that 'anything done * * * by a corporation * * * which if done * * * by any * * * officer thereof * * * would constitute a misdemeanor * * * shall also be held to be a misdemeanor committed by such corporation,' and 'every person or corporation who shall * * * grant or give * * * any * * * rebate * * * shall be deemed guilty of a misdemeanor.' This is not a specific authorization for a joint indictment; it is a declaration that the same act shall at one and the same time be a misdemeanor on the part both of the officer, who is the actor, and the corporation, who suffers him to act. The language of that statute seems to me to render a joint indictment permissible, but if, as in this case and under this statute, that which is complained of is not one single act, which is at the same time individual by nature and corporate by act of Congress, but a condition of facts to which both corporate and individual action may be contributed, a joint indictment is not only permissible, but, if it be desired to bring in all the

actors and produce all the evidence, it may even be necessary."

United States vs. MacAndrews & Forbes Co., 149 Fed. Rep., 823, 832, 833.

In the following cases, as a matter of common law, apart from the statute, no difficulty was found in joining a corporation with its officers or agents, and no question was raised as to the propriety of such joinder.

State vs. Atchison, 3 Lee (Tenn.), 729.
Banner Pub. Co. et al. vs. State, 16 Lee, 176.
People vs. Detroit White Lead Works, 82 Mich., 471.
Overland Cotton Mill vs. People, 32 Colo., 263.
Thompson on Corporations, Sec. 4495.

4. As a matter of policy, such joinder is conducive to the proper administration of justice. It accomplishes the law's purpose by one trial without useless duplication, and it is well settled that defendants jointly indicted cannot demand a separate trial as of right (*United States vs. Marchant & Co.*, 12 Wheat., 480). Such a doctrine is peculiarly applicable to indictments against a corporation and individual defendants where practically the identical evidence is adducible against both classes of defendants.

C.

The plaintiff-in-error is in no position to question the constitutionality of the Elkins Act in permitting such joinder; but even if it were, the Act will be found clearly constitutional.

The plaintiff-in-error argues that if the agent of the corporation were also a stockholder of the corporation the "result would be to punish twice acts

committed by the individuals in fact and imputable to the corporation only by a legal fiction " (Brief, Plaintiff-in-Error, p. 85). Also for the further reason that such enforcement would subject a stockholder agent "to a different and greater punishment" than could lawfully be imposed upon an individual not a stockholder who commits the same acts (Brief, Plaintiff-in-Error, p. 85).

1. In the first place no such question arises upon this record. There is no evidence that either Guilford or Pomeroy were stockholders of the defendant corporation. If such had been the case the only method in which the special disability of such stockholder could be presented, even assuming that it were a defense, would be by a special plea, setting up the facts and bringing it to the attention of the Court *(United States vs. Wilson*, 7 Peters, 150, 160 ; *Bishop's New Criminal Procedure*, Sec. 81).

Such an objection, therefore, taken in this case is fanciful and supposititious, and this Court will not listen to a constitutional argument raised in such a manner.

> " But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this Court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."
>
> *Hatch vs. Reardon*, 204 U. S 152, 160.

2. ***But on the merits of the contention itself the position of the plaintiff-in-error is fundamentally absurd.***

In the first place it is a little difficult to perceive how a statute whose penal provisions are expressly limited to the imposing of a fine, can, under *any circumstances*, put *any defendant* "twice in jeopardy *of life or limb.*"

But passing that preliminary objection the vital error in the whole of the contention of our opponents lies in its assumption of the identity of a corporation with its stockholders. This error underlies their entire argument from the beginning to the end of their brief, and crops out constantly under their different points. They disregard a fundamental conception of corporate law which is as essential in criminal remedies as in civil—a conception which is not only a theory of law but which furnishes the broad principle upon which men act in deciding whether or not they will enter corporate relations. When any number of individuals decide to incorporate their business, as in the supposititious cases put by our opponents on pages 80, 62, 64 and 65 of their brief, they succeed thereby in divesting themselves individually of certain important liabilities and transferring them to the fund represented by the corporation. They are no longer individually responsible for its debts. They are no longer individually liable for the acts of others of its agents than themselves. These are the great reasons why men incorporate their business and in these respects such individuals have received from the State the right to an important curtailment of the liabilities which they otherwise would be under. In these respects the creditors of that business and the State have only the fund of the corporation to which to look.

Now, if these individuals after having divested themselves of *personal responsibility*, were able to impute to their corporation and to its business all of the *personal immunities* and *rights* peculiar to them as natural persons and not necessarily appurtenant to the business, they would have succeeded by the act of in-

corporation in taking an undue advantage of the State. Their business thus incorporated would enjoy all the rights peculiar to natural persons with none of the responsibilities of such persons. Such incorporation would be a game of "heads I win, tails you lose."

We feel disposed to apologize for taking the Court's time with the statement of a position so elementary, but it has been made necessary by the fact that the contrary position underlies the whole argument of the other side. The authoritative decisions of this Court make it clear that this basic contention is unfounded; that the privileges and immunities possessed by the stockholders are not *ipso facto* those of the corporation:

> "If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in the matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to

be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. *Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.*

Bank of Augusta vs. Earle, 13 Pet., 519, 586; see, also, *Paul vs. Virginia*, 8 Wall., 168.

The case of *Hale vs. Henkel*, 201 U. S., 43, *supra*, is a complete denial of our opponents' contention. It was there held that a corporation was not entitled to the guarantee of the fifth amendment against self-crimination. If our opponents' doctrine that a corporation is entitled to all the personal guarantees and privileges of its individual stockholders were well founded, then in that case The American Tobacco Company properly asserted the constitutional rights of its stockholders. Of course, the decision of this Court in denying to the corporation a constitutional right which the stockholders undoubtedly possess is a complete denial of our opponents' contention.

Mr. Justice FIELD, sitting in Circuit, held flatly that the double jeopardy provision of the fifth amendment is limited to natural persons.

> "From the nature of the prohibitions in this amendment it would seem, with the exception of the last one ["nor shall private property be taken for public use without just compensation"], as though they could apply only to natural persons. No others can be witnesses; *no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves.*"
>
> *Railroad Tax Cases*, 13 Fed., 722, 746.

3. The plaintiff-in-error invokes only two precedents which it claims supports its contention, namely, *United States vs. McKee, 4 Dill., 128,* and *United States vs. One Distillery, 43 Fed., 846.* An analysis of these cases will show that there is only a single dictum in the Distillery Case which bears upon the question at all and as an expression of the Judge who wrote the opinion we submit that it is without foundation of law. This court expressly declined to pass upon the merits of that question when it came before it on appeal.

United States vs. One Distillery, 174 U. S., 149, 152.

The views of the Judge in the *One Distillery Case* have since been disapproved by two later decisions.

United States vs. 3 Copper Stills, 47 Fed., 495.

United States vs. Olsen, 57 Fed., 579, 585.

POINT FIVE.

The whole argument of the plaintiff-in-error is based upon doctrines which have been entirely outgrown by the development of the modern corporation and have long been obsolete.

1. The fundamental doctrine which underlies the entire position of the plaintiff-in-error in making the contentions which we have just answered, is the old doctrine of *ultra vires* which from the earliest days has been put forth by the defenders of corporations to avoid liability for wrongs committed. Step by step they have been driven back from this position and the liability of the corporation for wrongs first civilly and

then criminally has been gradually established, until now it is universally recognized.

The doctrine of such corporate defenders was aptly characterized in a criminal case by the Supreme Court of New Jersey over fifty years ago.

> "It is further objected that a corporation aggregate cannot be liable to indictment for any crime, because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney, in his argument in The Chestnut Hill Turnpike Co. v. Rutter, 6 Binney, 12: 'According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice.'"
>
> *The State vs. The Morris and Essex Railroad Co.*, 23 N. J. L. Rep., 360, 369.

The argument thus denounced by the court half a century ago is precisely the same which this plaintiff-in-error raised by its 27th request to charge and for a refusal to charge which it now assigns error.

> "That in order to find that the defendant Pomeroy or Guilford was acting within the scope of his employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent had authority to establish lawful rates, but must find also that such agent had authority to

make the unlawful rates alleged in the indictment" (See Brief Plaintiff-in-Error, p. 31, Record, p. 81.

The argument was given scant courtesy by this Court in the Hollister case where Justice MILLER said:

> "It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation; for they would thus escape taxation and ruin all competitors."
>
> *Salt Lake City vs. Hollister*, 118 U. S., 256, 259.
>
> See also *Goodspeed vs. The East Haddon Bank*, 22 Conn., 530, 536.
>
> *Philadelphia, etc., R. R. Co. vs. Quigley*, 21 Howard, 202.

2. The logical result of such a contention is as above pointed out that the corporation escapes all liability; that the only persons who can be punished are the agents themselves. Our opponents are reduced to admit this in their brief by contending that such liability of the individual agent is sufficient for the purposes of justice and of prevention.

See Brief, Page 69.

This is again an old story and one which long ago was discussed by the courts many times and had its unsoundness pointed out.

> "We are told that this remedy is not required because the individuals who concur in voting the order or in executing the work may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former; and the latter if they can be identified are commonly persons of the lowest

rank, wholly incompetent to make any reparation for the injury. *There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings*" (Lord DENMAN in *The Queen vs. Great North. of England Railway Company*, 9 Q. B., 315, 327 (1846)).

"It is said that the acts done are not the acts of the city, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who make no profit out of it, while the city grows rich in the performance." (*Salt Lake City vs. Hollister*, 118 U. S., 256, 260.)

See, also, *Chestnut Hill & Spring House Turnpike Co. vs. Rutter*, 3 S. & R. (Pa.), 6 (1818).

And in no conceivable case could the contention be more flagrant than a case of this kind arising under the Interstate Commerce Laws where the ineffectiveness of a punishment which reached only the agent has been demonstrated by a nation's experience.

"What has been the great difficulty in the way of administering the interstate commerce law? Where has the trouble originated? Mind you, that in sixteen years, with all of the broad provisions making criminal the acts that we reprobate, no single successful prosecution has been waged against a malefactor; not one. There has been no conviction. Why? Simply because the Interstate Commerce Commission could not make the proofs. The knowledge that was essential to conviction was locked in the minds of a comparatively

few people. The prosecutions were almost invariably against that class, and the community of kindly feeling, the close relations that existed prevented one member of that class from testifying against his fellows, and hence it has been that prosecutions have failed. *They refused to testify, because the punishment would fall upon the individual and might be for long periods of imprisonment.* Hence the witnesses would not and could not be made to testify. We are trying to remedy that difficulty."

Mr. Hepburn in debate in the House on the Elkins' Bill, 1903 (36 Cong. Rec., pages 2151–2159).

See also Report of Interstate Commerce Commission, Jan. 17, 1902, p. 6.

See also Report of Interstate Commerce Commission, 1892, p. 39.

3. And apart from these reasons of public policy, there is no injustice in punishing the corporation, but quite the reverse. As pointed out by the Interstate Commerce Commission, the offense is committed for its benefit.

See 6th Annual Rep. Interstate Commerce Commission, 1892, page 39.

See also 15th Annual Report Interstate Commerce Commission, page 7.

And in committing the crime the offending agent acts with all the momentum of the corporate fund and power behind him and is just by so much a greater menace to society. It is no new doctrine of law that under such circumstances the fictitious personality which thus participates in the offense shall be made punishable therefor, even if its owner be wholly innocent of such participation. Among the earliest cases of this court are decisions holding a vessel and other property forfeitable *in rem* for acts in which they participated, even though their owners were wholly innocent.

"Controversies of the kind have arisen in our judicial history; and it has always been held in

such cases that the acts of the master and crew bind the interest of the owner of the ship, whether he be innocent or guilty, and that in sending the ship to sea under their charge he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by means of their unlawful or wanton misconduct" (*Dobbins's Distillery vs. United States*, 96 U. S., 395–401).

Citing *United States vs. Brig Malek Adhel*, 2 How., 210.

POINT SIX.

None of the formal objections to the indictment are well taken.

All of the contentions made under the defendant's fourth point as to the form of the indictment were raised on their demurrer and argued before Judge HOLT, and his opinion, as it seems to us, clearly and decisively disposes of them.

(Record, Fol. p. 30), 146 Fed. Rep., 298.

Similar indictments have been sustained by Judges HOUGH and HOLT in other cases.

United States vs. Great Northern Railway Co., 157 Fed. Rep., 288.

United States vs. Delaware, Lackawanna & Western, 152 Fed., 269.

We submit these opinions confidently as sufficient answer on this point made by our opponant. It is only necessary perhaps to point out that their chief contention as to the necessity of averring that some advantage was given or discrimination practiced has, since the foregoing cases, been finally disposed of adversely to them by this court in the Armour case.

Armour Packing Co. vs. United States, 209 U. S., 84.

As indicative of the lack of seriousness of the contentions grouped in this point, we also call attention to the fact that one of these contentions is based upon the alleged failure of the indictment to use the word "willfully."

Brief, pages 93, 94, 95.

As a matter of fact the word "willfully" is used (though as we believe, under the Armour case, quite unnecessarily) in each of the counts of the indictment (fols. 13, 16, 19, 22, 25, 26).

POINT SEVEN.

Each of the counts of the indictment charges a separate offense and the sentence upon each count was proper and should be affirmed.

1. This question as presented by the facts in this case is very simple. Unlike the Standard Oil case and the Armour case where the unlawful rate consisted in a "concession" made by the railroad company *in the first instance* and where the railroad company never received the lawful tariff rate, here, as the Court will remember, the full amount of the lawful tariff was originally paid by the shipper upon all of the shipments and the offense was not consummated until a specific sum of money as a rebate from that lawful tariff rate was repaid by the carrier. Therefore, the illegal acts of the offending carrier are much more clearly divisible than they might otherwise have been.

The Court will recall that each of the counts charges the payment of a separate rebate upon a separate day, each rebate affecting a separate series of shipments covering a period of one or two months. Further-

more, each of these payments was made upon a separate claim of the amount of the payment filed with the carrier by the shipper. The parties to the offense have thus sharply separated their transactions. Each payment by the Railroad Company was totally distinct from every other as a matter of fact and related to a wholly different series of shipments and thus to a wholly different commercial transaction.

2. Furthermore, each successive payment was an entirely voluntary act on the part of the carrier. It was under no legal obligation to make the payment. This has been made absolutely clear by the decisions of this Court. The unlawful agreement with the shipper, on April 26th, 1904, placed the carrier under no obligation to carry out that agreement on August 31st, 1904, when the first rebate was paid. Even if the carrier had given a bill of lading for the goods at the unlawful rate, it would have been its duty, and it would have been legally free to refuse to accept any lower sum than that named in the lawful tariff.

Texas & Pacific Railway Co. vs. Mugg, 202 U. S., 242.
Railroad Co. vs. Hefley, 158 U. S., 98.

On August 30th, 1904, the situation was, therefore, that the Railroad Company had carried the shipments of April and May at the lawful tariff rates; it had not yet committed the offense charged in reference to those shipments and it was under no obligation to do so. It was not until the following day when it paid the rebate that the offense was consummated and it became criminally liable. There was then on that day, beyond any doubt, the completion and consummation of a crime under the Elkins Law.

Correspondingly, when the next date of payment (September 14th) arrived, the Railroad Company was perfectly free, so far as legal obligation was concerned, to pay or not pay the rebates agreed upon as to the

shipments of June. It had had a *locus penitentiae* since the last crime. It was quite free and it was its duty even at that time, to repudiate the unlawful arrangement and decline to further carry it out. When, therefore, on September 14th, it actually paid the rebate, can it be doubted that this constituted a new and complete offense under the Act? And the same thing is of course true as to the remaining payments covered by the indictment. As was stated by Judge HOUGH in a similar case against another carrier under a similar indictment in the same district:

> "But it is an equally great abuse of the statute to argue that all the overt acts flowing from the originally criminal agreement must necessarily be (so to speak) merged in the agreement. This is a method of capitalizing offenses to be as much discouraged as the undue subdivision thereof. If, however, the payment and acceptance of the rebate be the substantial offense here charged, then I think each substantial payment is properly the subject of separate indictment or count, just as truly as each separate and distinct visit of a burglar to a chest he slowly rifles of a set of silverware constitutes a separate offense, although it was his original intention to take the entire set sooner or or later."
>
> *United States vs. Great Northern Ry. Co.*, 157 Fed. Rep., 288, 291.

In the case of *In Re Henry*, 123 U. S., 372, a similar but less clearly untenable contention was made on behalf of the offender with reference to the provisions of Section 5480, punishing schemes to defraud by means of the Post Office establishment. This Court said:

> "As was well said by the district judge on the trial of the indictment, 'the act forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but

the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the Act.' It is not, as in the case of *In Re Snow*, 120 U. S., 274, a continuous offense, but it consists of a single isolated act and is repeated as often as the act is repeated" (Affd. *In re De Bara*, 179 U. S., 316).

3. Again, if this contention were well founded and all of the transactions set forth in the indictment constituted but a single offense, a conviction under the original agreement or a conviction for the giving of a rebate on August 31st, 1904, could be pleaded in bar to prosecutions for the giving of the later rebates in September, October and November, 1904. That such a result would be preposterous hardly needs argument. A similar situation was presented in *Bliss vs. United States*, 105 Fed. Rep., 508, where a defendant upon trial for aiding in counterfeiting urged that a prior conviction for counterfeiting similar notes from the same plates of the same series but at a different time, was a bar and that the entire matter was a continuous offense and could not be severed. The Circuit Court of Appeals dismissed the contention with the statement that

> "The law is clear that, on the state of facts which this record shows, the counterfeiting of notes at different times, although all apparently of the same series and printed from the same plate, constitutes distinct offenses."

4. The law does not penalize merely an agreement or offer to give rebates. It penalizes the *payment*, and therefore necessarily each payment. It was the intention of the law to stop the offense of rebating by making the penalties more effective than the experience of the previous sixteen years had demonstrated

the penalties under the old law to be. If our opponents' contention were well founded, Congress in 1903, instead of making the law more effective, succeeded only in establishing what would amount to a license system for the perpetual giving of rebates under an initial agreement. The records in the two cases now before this Court, Nos. 57 and 69, show that carriers and shippers might well afford to pay $20,000 for the privilege of being allowed to rebate indefinitely thereafter.

POINT EIGHT.

1. Plaintiff-in-error urges that a portion of the charge in regard to Embleton and his books, constitutes reversible error. The Court will remember that the facts brought out in the trial were these :

The book in question was a special book recording illegal claims against the Railroad Company, and was kept by Embleton in a manner and under a system which was different from the manner and the system in which the regular and legitimate claims against the Railroad Company were recorded. In March, 1906, Embleton's chief was called before the grand jury shortly before the finding of the indictment in this case, No. 57, and during the very month in which the indictment in the other case, No. 69, was found. During that very month Embleton went away to Texas, on leave of absence on the score of sickness, according to the testimony of Wilson, an interested witness (fol. 75). At the same time this book, the property of the defendant corporation, containing entries of these illegal claims disappeared (See Statement of Facts, p. 14).

All of these facts were before the jury admitted without any objection or exception on the part of the

defendant. The Court submitted the case to the jury upon instructions as to the necessity of criminal intent which were far more favorable to the defendant than would have been necessary under the recent decision of this court in the *Armour case*. He submitted these undisputed facts to the jury in connection with this question of intent leaving it wholly to the jury whether or not they would draw any inferences from such undisputed facts already before them. His course in so doing was perfectly proper.

See *Clifton. vs. United States*, 4 How., 242.
United States vs. Flemming, 18 Fed. Rep., 907.
1 Wigmore on Evidence, Secs. 285–291.

The Judge also expressly charged the jury in respect to the evidence which he quoted :

> " Now, gentlemen, if my quoting of this evidence does not consort with your recollection of it, you are to be guided by your own recollection of it. I will endeavor to state it correctly. If I state it wrongly in any respects you will correct me " (fol. 98).

Furthermore, in a later portion of his charge made in response to the defendant's request he charged

> " that there is no evidence that the defendant corporation or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the Government was asked " (fol. 109, p. 83).

If, by any construction, any injustice could have been done to the defendant by the first portion of the charge, this last request certainly cured it.

2. At page 45 of their brief, counsel for the plaintiff-in-error, without making it a specific point, assert that the court's refusal to charge request No. 20 is an error

which "is enough to require the reversal of the judgment." They make this assertion in connection with an alleged statement of the court below as to "ratification by the Company of the acts of its agents" (Record, pp. 43–44).

It should be noted that this statement of the Court did not take place in the presence of the jury, but was made upon the decision of a preliminary motion to quash. Later, when he declined to charge request No. 20, he was amply justified in his refusal by the fact that there was no evidence whatever before the jury as to ratification by the corporation. The Court was not called upon to charge an academic proposition of law.

3. We do not think that it is necessary to take up any of the other points mentioned in the brief.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Circuit Court should be affirmed.

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(20,686.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 294.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Petition for Writ of Error.

To the Honorable the Judges of the Circuit Court of the United State for the Second Circuit:

Comes now the above named defendant and complains that in the record and proceedings lately had in the above entitled cause on an indictment for alleged violations of the Act of February 19, 1903, entitled, "An Act to Further Regulate Commerce with Foreign Nations and Among the States," and in the judgment and sentence therein rendered against this defendant on the 22nd day of November, 1906, manifest error hath intervened to the great damage of this defendant, as by reference to the said record and proceedings and the assignment of errors herewith filed will more fully and at large appear.

Wherefore this defendant prays for the allowance of a writ of error, and for such other orders and process as may cause all and singular the said record and proceedings in the said cause to be sent to the Supreme Court of the United States, so that, the same
2 being inspected, the said Supreme Court may cause further to be done in the premises, to correct such error, what of right and according to the law and custom of the United States ought to be done; and that the said writ of error may be made a supersedeas, and that execution of the judgment in this cause and all proceedings therein may be superseded and stayed pending the final determination, judgment and mandate of the said Supreme Court.

And your petitioner will ever pray.

Dated, New York, March 30th 1907.

ALBERT H. HARRIS,
Attorney for the Defendant-Petitioner, 417 Grand Central Station, Manhattan, New York City, N. Y.

(Endorsed:) United States Circuit Court, Southern District of New York.—The United States of America, *vs.* The New York Central and Hudson River R. R. Co.—Petition for writ of error.—Albert H. Harris, Attorney for Petitioner, 417 Grand Central Station, Manhattan, New York City, N. Y.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America and the New York Central and Hudson River Railroad Company, wherein judgment was rendered on the 22nd day of November last past, a manifest error hath happened, to the great damage of the said Company, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 27 day of April 1907, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and

4 custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 30 day of March, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. Let the same operate as a supersedeas upon the filing with the Clerk a good and sufficient bond for damages and costs, in the sum of eighteen thousand dollars ($18,000.00).

E. H. LACOMBE,
United States Circuit Judge.

5 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from one to 137 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of the New

York Central and Hudson River Railroad Company, plaintiff-in-error, against the United States of America, defendant-in-error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of April in the year of our Lord, one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

6 [Endorsed:] E. & O. E. 2571. United States Supreme Court. The New York Central and Hudson River R. R. Co., Plaintiff-in-error, *vs.* The United States of America, Defendant-in-error. Writ of error. U. S. Circuit Court. Filed Apr. 1 1907. Southern District, New York. John A. Shields, Clerk. Albert H. Harris, Attorney for plaintiff-in-error, 417 Grand Central Station, Manhattan, New York City, N. Y. A copy of [Illegible] this day [Illegible] Apr. 1, 19—. Henry L. Stimson, U. S. Attorney. E. 145 m.

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the fourteenth day of March, in the year of our Lord one thousand nine hundred and six, and continued by adjournment to and including the 24th day of March, in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present, that at the times hereinafter mentioned, the New York Central & Hudson River Railroad Company, was and still is a railroad corporation duly organized under and existing by virtue of the Laws of the State of New York and engaged in the transportation of passengers, freight and property for hire, by railroad, on and by its own lines and routes and by arrangement with divers and sundry other connecting railroads, for a continuous carriage and shipment under a common control, management and arrangement, from the City of New York, by way of the Southern District of New York to the City of Cleveland, in the State of Ohio, and beyond; and at all such times the said New York Central and Hudson River Railroad Company was a common carrier subject to the provisions of an act of Congress approved February 4th, 1887, entitled "An Act to Regulate Comerce" and of the

acts amendatory thereof and supplemental thereto, and was engaged in the transportation of many different kinds of freight and property in interstate and foreign commerce.

That at all the times so as aforesaid mentioned the said New York Central & Hudson River Railroad Company had complied with the provisions of the said acts of Congress by printing and keeping open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property which, as a common carrier, it had established and which were in force at such times upon its various lines and routes, by posting the same in its depots and stations, and by filing copies thereof with the Interstate Commerce Commission, and by notifying the said Commission of all changes made in the same, in accordance with the provisions of said acts.

That at all the times herein mentioned the rates set forth in said tariff or schedule, so filed and published as aforesaid, from New York City, by way of the Southern District of New York, as aforesaid, to Cleveland, in the State of Ohio, upon property of the character and the kind and class herein referred to, was twenty-one cents for each one hundred pounds thereof, which said rate or schedule of twenty-one cents was the rate charged, demanded, collected and received by the said New York Central Hudson River Railroad Company from other persons than "The American Sugar Refining Company," below mentioned, for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned.

8 That at all the times herein mentioned the said "The American Sugar Refining Company" was a corporation organized and existing under and by virtue of the Laws of the State of New Jersey.

And the jurors aforesaid, on their oath aforesaid, do further present, that on the 20th day of November, in the year of our Lord nineteen hundred and two, the officers and agents of the said "The American Sugar Refining Company," acting within the scope of their employment by the said company, induced the said New York Central & Hudson River Railroad Company to enter into an unlawful agreement and arrangement with the said "The American Sugar Refining Company," whereby it was agreed that, in the event of the said "The American Sugar Refining Company" shipping a portion of its products over the lines and routes aforesaid from the City of New York in the State of New York, to the City of Cleveland, in the State of Ohio, and paying to the said New York Central & Hudson River Railroad Company the full rates and charges named in said schedules as common carrier as aforesaid, that is to say, twenty-one cents on each one hundred pounds so shipped and transported, the said New York Central & Hudson River Railroad Company would allow a rebate to the said "The American Sugar Refining Company" of six cents for each one hundred pounds of sugar so shipped and transported to the City of Cleveland, in the State of Ohio, for reconsignment to points beyond said city, and a rebate of

four cents for each one hundred pounds of sugar shipped and transported, as aforesaid, to said City of Cleveland, to go no further; the said sums in such cases, respectively, to be refunded from the lawful amounts paid, as aforesaid, according to the tariff schedules aforesaid of twenty-one cents for each one hundred pounds of such shipments and transportations.

And it was then and there agreed by and between the said companies, that, thereafter upon any and all shipments of sugar, as aforesaid, the said "The American Sugar Refining Company" should present its claims to and upon the said railroad company for rebate and drawback, under the agreement aforesaid, and the same should be paid by the said railroad company to the said "The American Sugar Refining Company," thereby reducing the tariff of twenty-one cents per each one hundred pounds in and by the amounts of six cents, or four cents, for each one hundred pounds, respectively, as the case might be.

And under the aforesaid agreement and arrangement the said "The American Sugar Refining Company" made divers and various consignments of sugars over the said New York Central & Hudson River Railroad Company's lines, and the lawful tariff rate scheduled at twenty-one cents per each one hundred pounds by said railroad company, as aforesaid, was duly paid, according to said agreement, by the said "The American Sugar Refining Company" to the said railroad company, and the said sugars were actually shipped and transported under the said agreement over the said railroad company's lines, by way of the Southern District of New York, as aforesaid, to Cleveland, in the State of Ohio, and points beyond; and thereafter divers claims for rebate and drawback for and on account of said sugars, transported as aforesaid, were presented by the said "The American Sugar Refining Company" to the said railroad company for payment, but the amount of each claim, its items and the time of its presentation, as aforesaid, are to the jurors unknown.

That on the second day of April, in the year of our Lord, Nineteen hundred and three, the said New York Central & Hudson River Railroad Company, at the Southern District of New York, and within the jurisdiction of this Court, paid and caused to be paid, to the said "The American Sugar Refining Company," by way of rebate and drawback, the sum of Twenty-six thousand one hunder and forty-one dollars and eightey-one cents ($26,141.81) for and on account and by way of, the rebate and drawback hereinbefore set forth and agreed to, by and between the said companies, for the reduc-
9 tion of the said tariff schedules as aforesaid, said rebate and drawback being so paid upon the claims aforesaid and in respect to the sugar shipped and transported as aforesaid.

And so the jurors aforesaid, on their oath aforesaid, do say that the said New York Central & Hudson River Railroad Company, a corporation and common carrier as aforesaid, in manner and form and by means aforesaid, in and by the aforesaid payment of Twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81), as aforesaid, to the said "The American Sugar Refining Company," as aforesaid, by way of the rebate and draw-

back, as hereinbefore recited, within the jurisdiction aforesaid, on the said second day of April, in the year of our Lord Nineteen hundred and three, did unlawfully and wilfully violate the provisions of the said act to regulate commerce and the acts amendatory thereof, in that the said New York Central & Hudson River Railroad Company then and there did take, receive and collect, of and from the said "The American Sugar Refining Company" in and for the transportation of its said freight and property, as aforesaid, a less compensation for said services rendered than the said New York Central & Hudson River Railroad Company charged, demanded, collected and received from other persons for doing for them like and contemporaneous services, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, and so was then and there guilty of unjust and unlawful discrimination; and did unlawfully offer, grant and give a rebate, concession and discrimination in respect to the aforesaid transportation of said freight and property, in interstate commerce; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States, in such case made and provided.

Second Count.

And the jurors aforesaid, on their oath aforesaid, do further present, that, at the times hereinafter mentioned, the New York Central & Hudson River Railroad Company, was and still is a railroad corporation duly organized under and existing by virtue of the Laws of the State of New York and engaged in the transportation of passengers, freight and property for hire, by railroad, on and by its own lines and routes and by arrangement with divers and sundry other connecting railroads, for a continuous carriage and shipment under a common control, management and arrangement, from the City of New York, by way of the Southern District of New York, to the City of Cleveland, in the State of Ohio, and beyond; and at all such times the said New York Central and Hudson River Railroad Company was a common carrier subject to the provisions of an act of Congress approved February 4th, 1887, entitled "An Act to Regulate Commerce" and of the acts amendatory thereof and supplemental thereto, and was engaged in the transportation of many different kinds of freight and property in interstate and foreign commerce.

That at all the times so as aforesaid mentioned the said New York Central & Hudson River Railroad Company had complied with the provisions of the said acts of Congress by printing and keeping open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property which, as a common carrier, it had established and which were in force at such times upon its various lines and routes, by posting the same in its depots and stations, and by filing copies thereof with the Interstate Commerce Commission, and by notifying the said Commission of all changes made in the same, in accordance with the provisions of said acts.

That at all the times herein mentioned the rates set forth in said tariff or schedule, so filed and published as aforesaid, from New York

City, by way of the Southern District of New York, as aforesaid, to Cleveland, in the State of Ohio, upon property of the character and the kind and class herein referred to, was twenty-one cents for each one hundred pounds thereof, which said rate or schedule of twenty-one cents was the rate charged, demanded, collected and received by the said New York Central & Hudson River Railroad Company from other persons than "The American Sugar Refining Company," below mentioned, for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned.

That at all the times herein mentioned the said "The American Sugar Refining Company" was a corporation organized and existing under and by virtue of the Laws of the State of New Jersey.

And the jurors aforesaid, on their oath aforesaid, do further present, that prior to the second day of April, in the year of our Lord nineteen hundred and three, the said New York Central & Hudson River Railroad Company accepted for transportation from the said "The American Sugar Refining Company" certain sugars to be transported from the said City of New York, by way of the Southern District of New York, to the City of Cleveland, in the State of Ohio, over the lines and routes aforesaid, and received payment therefor from the said "The American Sugar Refining Company," at the rate of twenty-one cents for each one hundred pounds thereof; and such payment was at the regular published tariff rates for such freight, as published and filed with the Interstate Commerce Commission by the said New York Central & Hudson River Railroad Company on merchandise of the character aforesaid; and the said railroad company having so transported the said sugars from the said City of New York, by way of the Southern District of New York, as aforesaid, at and in the said District and within the jurisdiction of this Court, on the said second day of April, in the said year, did unlawfully and wilfully offer, grant and give to the said "The American Sugar Refining Company" the sum of Twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81) as and for an unlawful rebate, concession and discrimination.

And so the jurors aforesaid, on their oath aforesaid, do say that the said New York Central & Hudson River Railroad Company, a corporation and common carrier as aforesaid, in manner and form and by means aforesaid, in and by the aforesaid payment of Twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81), as aforesaid, to the said "The American Sugar Refining Company," as aforesaid, by way of the rebate, concession and discrimination, as hereinbefore recited, within the jurisdiction aforesaid, on the said second day of April, in the year of our Lord nineteen hundred and three, did unlawfully and wilfully violate the provisions of the said act to regulate commerce and the acts amendatory thereof and supplemental thereto, in that, the said New York Central & Hudson River Railroad Company then and there did take, receive and collect, of and from the said "The American Sugar Refining Company" in and for the transportation of its said freight and

property, as aforesaid, a less compensation for said services rendered than the said New York Central & Hudson River Railroad Company charged, demanded, collected and received from other persons for doing for them like and contemporaneous services, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, and so was then and there guilty of unjust and unlawful discrimination; and did unlawfully offer, grant and give a rebate, concession and discrimination in respect to the aforesaid transportation of said freight and property, in interstate commerce; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States, in such case made and provided.

HENRY L. STIMSON,
U. S. Attorney.

11 (Endorsed:) U. S. Circuit Court.—The United States of America, *vs.* The New York Central & Hudson River Railroad Company.—Indictment. Unlawfully granting rebate in violation of the act to regulate commerce I Supp. 525, 687 & 32 Stat. 23, 26.—Henry L. Stimson, U. S. Attorney.—A True Bill, Robert N. Bolton, Foreman.—U. S. Circuit Court, Southern District New York, Filed Mar. 24, 1906, John A. Shields, Clerk.—May 9, 1906. Deft. pleads not guilty with leave to withdraw on 21st inst. June 29, 1906. Demurrer argued. July 28, 1906. Order overruling demurrer Sept. 17, 1906, Albert H. Harris, att'y pleads not guilty on behalf of N. Y. C. & H. R. R. R. Nov. 14. Trial Commenced. Nov. 15, Trial concluded. Verdict, Guilty. Nov. 22. Def't sentenced to pay a fine of $18,000.

12 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Unlawfully Granting Rebate, &c., 1 Supp., 525, 687, and 32 Stat., 847.

And the said The New York Central and Hudson River Railroad Company cometh into Court here, and having heard the said indictment read says, that the same, and the matters therein contained in manner and form as the same are therein stated and set forth, are not sufficient in law, and that it is not bound by the law of the land to answer the same; and it is ready to verify.

And for specific and special causes of demurrer to the said indictment, the defendant Company assigns the following objections thereto:

1. The acts described and set forth therein do not constitute a crime under the laws of the United States.

2. The acts described and set forth in the first count thereof do not constitute a crime under the laws of the United States.

3. The acts described and set forth in the second count thereof do not constitute a crime under the laws of the United States.

4. The said indictment does not, nor does either of the counts thereof, apprise the defendant company with reasonable certainty of the nature of the accusation against them.

5. The said indictment does not, nor does either of the counts thereof, charge the time, place, nature and circumstances of the offense sought to be alleged with clearness and certainty.

Wherefore, for want of a sufficient indictment in this behalf, the said defendant Company prays judgment, and that by the Court it may be dismissed and discharged from the said premises in the said indictment specified.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By NATHAN GUILFORD, *Vice-President.*

13 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Nathan Guilford, being duly sworn, deposes and says that he is a Vice-President of the defendant Company above named, that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact, as he is advised by counsel and verily believes.

NATHAN GUILFORD.

Subscribed and sworn to before me, this 19th day of May, 1906.

ALBERT B. QUENCER,
[SEAL.] *Notary Public, N. Y. County.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HARRIS,
AUSTEN G. FOX,
JOHN D. LINDSAY,
Of Counsel for the said Defendant Company.

(Endorsed:) Circuit Court of the U. S., Southern District of N. Y.—The United States of America against The New York Central and Hudson River Railroad Company.—Demurrer.—U. S. Circuit Court, Southern District New York, Filed May 22, 1906, John A. Shields, Clerk.

14 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and NATHAN GUILFORD.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, NATHAN GUILFORD and FRED S. POMEROY.

UNITED STATES
vs.
NATHAN GUILFORD, FRED L. POMEROY, C. GOODLOE EDGAR, and EDWIN EARLE.

Henry L. Stimson, U. S. Attorney, William S. Ball, J. Osgood Nichols, and Henry A. Wise, Assistant U. S. Attorneys for the United States.

Austen G. Fox and John D. Lindsay, for the defendants, the New York Central &c. Co., Nathan Guilford and Fred L. Pomeroy.

Michael H. Cardoza and Howard S. Gans for the defendants C. Goodloe Edgar and Edwin Earle.

These are demurrers to four indictments. The indictments
15 are based on alleged violations of the Act to Regulate Commerce passed February 4, 1887, commonly called the Inter State Commerce Act, and the various acts amending and supplementing it, including the Act of February 19, 1903, commonly called the Elkins Act. Three of the indictments charge a giving or taking of rebates in violation of such act, and one a conspiracy to commit an offense against the United States by inducing the giving and taking of a rebate in violation of such act. The demurrers were argued at the same time and will be considered together.

The indictment against the New York Central and Hudson River Railroad Company contains two counts. The first count charges in substance that the defendant was a railroad corporation engaged in the transportation of freight for hire over its own and connecting roads, between, among other points, New York and Cleveland, Ohio; that its freight schedule, published as required by the Interstate Commerce Act, fixed the rate for freight on sugar from New York to Cleveland at 21 cents per 100 pounds; that on November 20, 1902, the officers of the American Sugar Refining Company, a New Jersey corporation induced the defendant to enter into the unlawful agreement to allow the sugar company a rebate of 5 cents per 100 pounds on sugar shipped by it to Cleveland for reconsignment to further

points, and 4 cents per 100 pounds on sugar shipped to Cleveland to go no further; that the sugar company shipped various consignments of sugar under said agreement over defendant's road and con-
16 necting roads to Cleveland and paid the schedule rate of 21 cents per 100 pounds; that afterwards claims for rebate on said shipments were presented by the Sugar Company to the defendant, upon which on April 2, 1903 the defendant paid to the Sugar Company by way of rebate $26,141.81. The Second count is substantially the same as the first except that the allegations of a preliminary agreement to pay rebates is omitted. The demurrer to this indictment alleges in substance that the acts set forth in the indictment and in each count thereof do not constitute a crime under the laws of the United States and that the indictment is not sufficiently definite and certain.

The principal objection to this indictment urged by the defendant's counsel is that the charge made in both counts that an unlawful discrimination was made in favor of the Sugar Company against other persons, is not sufficiently pleaded because no other person is named who was charged a larger rate, and reliance is put on the case of United States *v.* Hanley, 71 Fed. Rep. 672. In that case it was held in substance that the Interstate Commerce Act prohibited discriminations in rates between shippers and also deviations from the scheduled rates; that if an indictment was based on alleged discriminations between different shippers it was not enough to show that a particular shipper was charged less than the scheduled rate but the indictment must allege that some other person designated in the indictment had been charged a higher rate. The Court held that as the Company might make an equal reduction to everybody
17 from the scheduled rate, an allegation that a rebate from the scheduled rate had been returned to a particular shipper was not a sufficient allegation of an unlawful discrimination. If it were necessary to base the decision of this demurrer upon this point, I should hesitate to follow the decision in United States *v.* Hanley. I think that if a railroad company receives from a shipper the full schedule rate, and then repays him a percentage of the amount paid as a rebate, there is weighty ground to hold that it is presumptively guilty of illegal discrimination under the act, and that if in fact the railroad company has pursued the extremely improbable course of making an uniform reduction of its rates to everybody while retaining a higher rate on its published schedules no substantial injustice will be done any defendant if he is left to prove that fact as part of his defense. But without passing definitely upon this question it is sufficient to say that the case of United States *v.* Hanley also held that the payment of a rebate from the scheduled rates violated the provisions of the act prohibiting deviations from the published rates. The allegations of this indictment certainly support that charge sufficiently. In my opinion the indictment is sufficiently definite and specific and I think the demurrer to it should be overruled.

The indictment against the New York Central and Hudson River Railroad Company and Nathan Guilford charges in substance that

at all the times stated in the indictment the Railroad Com-
18 pany's scheduled rate on sugar from New York to Detroit,
Michigan, was 23 cents per 100 pounds; that the defendant Guilford was the defendant's traffic manager; that on October 15, 1902, Lowell M. Palmer and Thomas P. Riley, acting as agents of the American Sugar Refining Company and of the firm of W. H. Edgar & Son of Detroit, induced the Railroad Company and Guilford to agree to pay a rebate of 2 cents per 100 pounds on all sugar shipped by the Sugar Company to Edgar & Son; that shipments were thereafter made and the scheduled rates paid; that thereafter on May 14, 1903, the defendants paid to said Palmer as such agent $920.39 as a rebate. The grounds of demurrer to this indictment are that it is insufficient in law and that the acts set forth in it do not constitute a crime. The objections urged in its support by counsel are that it does not properly allege that any discrimination resulted; that it does not allege any wilful failure by the Railroad Company to observe the published tariff; and that the individual defendant is improperly joined with the corporation. The point of failure to properly allege discrimination I have already discussed under the first indictment considered; the fact that the indictment alleges that the full schedule rate was first paid to the Railroad Company and that there after $920.39 was paid by the defendants to Palmer as agent for the shippers "by way or rebate and concession in respect to the transportation of said sugars under said unlawful
agreement" is in my opinion a sufficient allegation that the
19 payment was a wilful failure to observe the published tariff;
and as the Interstate Commerce Act as amended and the Elkins Act provide that the corporation and its agents may be criminally liable for giving rebates I do not see why these defendants cannot be prosecuted for the same offense in one indictment. I think therefore that the demurrer to the indictment against the Railroad Company and Guilford should be overruled.

The indictment against the New York Central and Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy is in substance similar to the one against the Railroad Co. and Guilford and the objections taken to it in the demurrer and the agreement of counsel are similar to the objections taken to the indictment in that case. I think therefor- that the demurrer to this indictment should be overruled.

The indictment against Nathan Guilford, Fred L. Pomeroy, C. Goodloe Edgar and Edwin Earle, differs essentially from the three other indictments. It is an indictment for an alleged conspiracy under Section 5440 of the United States Revised Statutes. This indictment charges in substance that the New York Central and Hudson River Railroad Company was engaged in the transportation of freight for hire over an interstate route to Detroit, Michigan, by its own and connecting lines; that it had published a schedule of rates over this route, under the Interstate Commerce Laws; that the rate for sugar from New York to Detroit was 23 cents per 100 pounds;
that the American Sugar Refining Company and the Ameri-
20 can Sugar Refining Company of New York were corporations
engaged in selling and shipping sugar from New York over

said route; that the defendants Edgar and Earle with one James E. Edgar now deceased, were a firm doing business in Detroit under the style of W. H. Edgar and Son; that the defendants Guilford and Pomeroy were traffic managers of the Railroad Company; that Palmer and Riley were agents both for the Sugar Companies and for Edgar & Son; that on April 1, 1904, at the Southern District of New York, the said Guilford, Pomeroy, James Edgar, C. Goodloe Edgar and Earle, with other persons to the jurors unknown, conspired with each other and with said Palmer and Riley to commit an offense against the United States by causing and procuring the said Railroad Company to give rebates on sugar shipped by the Sugar Companies at New York to Edgar & Son at Detroit over the said route; that it was agreed by said conspirators that a rebate should be given on such shipments of 5 cents per 100 pounds; that sugars were so shipped, the carriage paid for at the scheduled rates, claims made for rebates, and the rebates paid by said Guilford and Pomeroy acting in behalf of said Railroad Company to said Palmer and Riley acting in behalf of said Sugar Companies and Edgar & Son. The indictment also alleges as acts done to effect the object of the conspiracy that a letter was written by Pomeroy to Palmer stating the details of the agreement for rebates; that in July and August, 1904, Edgar & Son purchased certain sugars from the Sugar Companies which Palmer and Riley caused to be shipped to them at
21 Detroit and paid for at the tariff rates; and that subsequently claims for rebates were presented and certain checks paid for such rebates, one check for $2,474.54 dated October 28, 1904, and one for $1,979.64 dated October 29, 1904.

Various objections under the demurrer are taken to this indictment. In my opinion the most serious of these objections is the claim that Congress having by the Elkins Act expressly abolished imprisonment as a penalty for any offense committed under the Acts to regulate Commerce, an indictment will not lie for a conspiracy to commit such an offense which is an offense punishable by imprisonment.

Section 5440 of the United States Revised Statutes, under which this indictment is brought, provides as follows:

"If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and wh-n one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the Court."

The 10th section of the Interstate Commerce Act as amended, previous to the Elkins Act, provided that any common carrier, or, when it was a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for such corporation, who should be convicted of the offense of an unlawful discrimina-
22 tion in rates should be liable to a fine not to exceed $5,000. or to imprisonment not exceeding two years or both. Any such carrier or person who by false billing, classification, weighing or

other device should wilfully assist or willingly permit any person to obtain transportation for property at less than the regular rates should be subject to the same punishment of fine and imprisonment. False billing by shippers or inducing carriers to discriminate unjustly was subject to the same punishment. But the Elkins Act passed in 1903, abolished the punishment of imprisonment in such cases, and substituted for it a heavier fine than that authorized by the Interstate Commerce Act. The punishment for the wilful failure of a carrier to file and publish the rates required by the Act was made a fine of not less than $1,000. and not more than $20,000. It was made unlawful for any person or corporation to offer, grant or give, or to solicit, accept or receive any rebate concession or discrimination, and the same punishment was fixed, a fine not less than $1,000. and not more than $20,000. The Act then provides as follows:

"In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

23 Section 4 of the Act also provides "that all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed."

It is impossible to deny that Congress intended in the Elkins Act to abolish the penalty of imprisonment for the offense of giving or taking rebates and to substitute for the previous punishment a much heavier fine than that which could be inflicted under the Interstate Commerce Act. If therefore the offense charged in this indictment is essentially the same offense as that created and punished in the Interstate Commerce Acts and the Elkins Act, this indictment in my opinion cannot be maintained. If Congress has made a certain action an offense and prescribed its punishment, the Courts cannot, by giving it some other name, increases the punishment. The question in this case therefore is whether the offense charged in the indictment as constituting the crime or conspiracy differs from the offense described in the Interstate Commerce Acts and the Elkins Act as the giving and receiving of rebates punishable by a fine.

In most cases, undoubtedly, a conspiracy to commit a crime is a distinct offense from the commission of the crime itself. This is true, of course, of all crimes committed by one person, for two persons at least are necessary for a conspiracy. Even if more than one person commits the crime there may be others engaged in a conspiracy to have it committed who do not take part otherwise in the commission of the crime. But there are certain crimes which

24 require for their commission the concurrent action and cooperation of more than one person. Such crimes as rioting, or duelling or bigamy, for instance, cannot be perpetrated by one person, and persons who do not perpetrate them might take part in a conspiracy to cause them to be done. But when the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult to

claim that their agreement to act is in law a conspiracy, and their act, a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it. The claim that the agreement to give it is a conspiracy punishable by imprisonment, while the actual giving it is an offense only punishable by a fine seems to me too subtle a distinction to be drawn in the administration of criminal law.

This view is not without authority to support it. In each of the cases of Shannon *v.* Commonwealth, 14 Penn. 226, and in Miles *v.* State, 56 Alabama, 390, a man and woman were indicted for a conspiracy to commit adultery with each other. It was held in each case that the conspiracy was the same thing as the substantive offense and the indictments were quashed.

25 Wharton, in commenting on these cases, says:

"When the law says a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name, it is not lawful for the prosecution to call it by some other name; and when the law says such an offense—*e. g.* adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable, and hence, persons combining to induce others to commit bigamy, adultery, incest or duelling do not fall within this exception, and may be indicted for conspiracy." (Wheaton's Crim. L. Sec. 1339.)

In Regina *v.* Boulton, 12 Cox. Cr. C. 93, Chief Justice Cockburn says:

"I am clearly of the opinion that when the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiracy to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused. The prosecutors are thus enabled to combine in one indictment a variety of offenses, which, if treated individually, as they ought to be, would exclude the possi-

26 bility of giving evidence against one defendant to the prejudice of others."

In United States *v.* Dietrich and Fisher, 126 Fed. Rep. 664 the indictment charged that the defendants entered into a conspiracy to commit an offense against the United States, by agreeing that Dietrich, a member of Congress, should procure the appointment of Fisher as postmaster, and that Fisher should pay to Dietrich therefor a certain sum of money as a bribe. The Court held that the indictment was bad, and, in the opinion, said:

"The making of such an agreement is not a conspiracy within the terms of Section 5440, but is a several and substantive offense

under Section 1781 upon the part of each of the parties, and this without the doing of any overt act in pursuance thereof. * * * As the transaction is stated in the indictment it was Dietrich who agreed to accept the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services or aid in securing such an appointment. * * * The agreement or transaction stated in the indictment was immediately and only between two persons, one charged with the intended
27 taking and the other with the intended giving of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses defined in Section 1731, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of acquiring, receiving or giving. * * * Because concert and plurality of agents, in the sense we have hereinbefore shown, are essential to each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in this indictment do not constitute a conspiracy under Section 5440."

And see Chadwick *v.* United States, 141 Fed. Rep. 225, 236 where the Dietrich case is cited with approval.

The counsel for the Government assert that the Dietrich case is to be distinguished from this case because in the Dietrich case but two persons, the giver and taker of the bribe, were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named and others to the jurors unknown were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and Pomeroy
28 represent simply the giver and Edgar and Earle simply the receiver of the rebate. The Government's counsel also claims that the bribery statute makes agreeing to give or receive a bribe an offense while the statutes prohibiting rebates does not in terms prohibit an agreement to give or receive a rebate. But they do prohibit an offer of a rebate or the solicitation of a rebate; and when such an offer or solicitation is acceded to by the opposite party, which the indictment alleges occurred in this case, an agreement is entered into. In short the Dietrich case seems to me, in its essential nature, strictly analogous to this case. The facts alleged in the indictment in the case at bar as steps taken to effect the object of the conspiracy are the same facts which it would be necessary to prove to sustain an indictment for giving and receiving rebates. On the trial of such an indictment the government would not make out a

case by simply proving the payment of the check. It would have to prove that the check was given in payment of a rebate. To establish that proposition it would be necessary to prove the agreement to give a rebate, the shipment of sugars, the payment of the full scheduled rates of freight, the filing of the claims for rebate, and the payment of such claims as rebate. Without proof of these facts these defendants could not be convicted of the crime of giving or taking rebates; with such proof, they could. They would thereupon be liable to be punished by the fines prescribed by the Elkins Act and by no other punishment, and especially not by im-
29 prisonment, which penalty for such a crime is specifically abolished by the Elkins Act. In my opinion, it is not in the power of the Government, by calling the same acts a conspiracy, to indict these defendants for a different crime, and to thereby subject them to the liability of imprisonment for acts for which such punishment was expressly abolished by the Elkins Act.

Since writing this opinion my attention has been called to an act to amend the act to regulate commerce and all acts amendatory thereof, which was approved on June 29, 1906, the day on which these demurrers were argued. That act amends Section 1 of the Elkins Act by striking out the provision abolishing the punishment of imprisonment for offenses under the Acts to regulate Commerce, and inserting in lieu thereof a provision "that any person, or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment in the discretion of the court." This provision, upon general principles, and by the express terms of the 10th section of the act is not retrospective, and does not make any person liable to the punishment of imprisonment for such offenses committed before the passage of the recent act; but
30 it authorizes the inference that in the opinion of Congress, without such an amendment, no punishment by imprisonment for such offenses could be imposed.

My conclusion is that the demurrers to the three indictments for giving or receiving rebates should be overruled, and the demurrer to the indictment for conspiracy should be sustained.

G. C. H.

(Endorsed:) Circuit Court of the United States, for the Southern District of New York.—United States *vs.* New York Central and Hudson River Railroad Company (and three other cases)—Opinion, Holt, J.—U. S. Circuit Court, Southern District of New York, Filed Jul- 6, 1906, John A. Shields, Clerk.

31 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on the 26th day of July, in the year of our Lord one thousand nine hundred and six.

Present: Hon. Chas. M. Hough, Dist. Judge.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

The above-entitled cause coming on to be heard upon the demurrer to the indictment filed on the 22nd day of May A. D. 1906, and being argued, pro and con, by counsel for the respective parties, on the 29th day of June of the same year, upon the issues of law joined therein, the court was of the opinion that the said demurrer should be overruled and the said opinion, in writing, was filed in the Clerk's Office of said Court on the 6th day of July in the year of our Lord one thousand nine hundred and six,

Now, therefore, on motion of Henry L. Stimson, Attorney for the United States, it is

Ordered, adjudged and decreed, that the said demurrer, pursuant to and in accordance with the said opinion, be, and the same is hereby overruled, with leave to the defendants to plead over, which they are required to do, at a Special Session of said Court to be held on the 17th day of September, 1906, in the New York Court House and P. O. Building.

CHAS. M. HOUGH,
U. S. Dist. Judge, Holding Circuit Court

32 (Endorsed:) U. S. Circuit Court, Southern District of New York.—The United States of America, *vs.* The New York Central & Hudson River Railroad Company.—Order.—Henry L. Stimson, United States Attorney, Attorney for U. S. A.—U. S. Circuit Court, Southern District New York, Filed Jul- 26, 1906, John A. Shields, Clerk.

33 WEDNESDAY, *Nov.* 14*th*, 1906.

The Court meets and is opened by proclamation.

Present: The Honorable George C. Holt, Judge.

U. S.
v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

E. 4190. Unlawfully Granting Rebate in Violation of the Act to Regulate Commerce. 1 Supp., 525, 687. 32 Stat., 23-26.

On motion of U. S. Attorney ordered trial.

Mr. J. D. Lindsay moves to quash indictment, argument made by A. G. Fox. Motion denied.

Jurors Sworn.

1. Edwin J. Gallies.
2. Charles C. Hughes.
3. Ignatius L. Lersuer.
4. Morris V. Mason.
5. George W. Ruddell.
6. Charles J. Rose.
7. Fred. R. Downes.
8. Chas. Moore.
9. Morris B. Nixon.
10. John A. Oakley.
11. Carl E. Peck.
12. Bowan W. Pierson.

H. A. Wise, Asst. U. S. Atty. opens case on behalf of prosecution. Motion to quash renewed and denied.

Evidence on Behalf of Prosecution.

Geo. T. Roberts sworn
Allan McMichael "
Fred E. Hurst "
Lowell M. Palmer "
Wm. F. Wilson "
Harry T. Leeming "

Government rests.
Adjorned to Nov. 15th, 1906.

34 THURSDAY, *November 15th*, 1906.

The Court meets and is opened by proclamation.
Present: The Hon. Geo. C. Holt, Judge.

U. S.
v.
NEW YORK CENTRAL & HUDSON RIVER R. R. Co. (Continued).

E. 4190. Continued from Nov. 14th.

Mr. A. G. Fox moves to acquit deft. Mo. denied.
Motion to direct a verdict acquitting deft. Mo. denied.
Mr. J. H. Choate appears by permission of the Court to argue a motion to quash the indictments in the cases of the U. S. *v.* American Sugar Refining Co. E. 4191 and U. S. *v.* N. Y. Central & Hudson River Railroad Co. (Now on trial) E. 4190. Motion denied.
Defendant rests.
Mr. A. G. Fox sums up for deft.
Mr. H. L. Stimson sums up for prosecution.
The charge is thereupon delivered by the court to the jury who retire in charge of an officer duly qualified to attend them and upon their return say they find the defendant Guilty. Adjd. to Nov. 20th for sentence.

35 THURSDAY, *November* 22, 1906.

The Court meets and is opened by proclamation.
Present: The Hon. Geo. C. Holt, Judge.

E. 4190.

U. S.
v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

A. G. Fox on behalf of deft. moves to set aside the verdict and for a new trial. Motion denied.

On motion of U. S. Attorney ordered the sentence.

A. G. Fox on behalf of defts. moves for an arrest of judgment. Motion denied.

The Court thereupon proceeds to pass judgment and sentences the defendant to pay a fine of eighteen thousand (18,000.00) dollars.

Mr. Fox moves for a stay of sixty days within which to perfect an appeal, and for a stay of sixty days of execution of judgment. Motions granted.

36 Circuit Court of the United States, Southern District of New York, in the Second Circuit, October Term, 1906.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Bill of Exceptions.

The issues in this action came on for trial at a stated term of this court begun and held in the City of New York within and for the District and Circuit aforesaid, on the 10th day of October, 1906, and continued by adjournment to and including the 14th day of November, 1906, before the Honorable George C. Holt, one of the United States District Judges for the Southern District of New York, who had been theretofore duly assigned to hold the said term.

The Government appeared by Henry L. Stimson, Esquire, Attorney for the United States for the District aforesaid, and Henry A. Wise, Esquire, Assistant United States Attorney. The defendant appeared by Albert H. Harris, Esquire, its attorney of record, and Messrs. Austen G. Fox and John D. Lindsay, of counsel.

The Government having moved the case for trial, the defendant moved for an order quashing the indictment as appears by the record, and to the Court's denial of the motion the defendant excepted.

A jury was duly impanelled and sworn, whereupon the defendant renewed its motion to quash upon each of the grounds therein stated. The motion was again denied and the defendant excepted.

The defendant then moved that the jury be directed to acquit the

defendant on the ground that the indictment was insufficient and defective for each of the following reasons:

37 "(1) The Act of February 19, 1903, known as the Elkins Law, on which the indictment is based, was enacted in excess of the power to regulate commerce with foreign nations and among the several States and with Indian tribes conferred upon the Congress by section 8 of Article I of the Constitution of the United States and is unconstitutional and void in that it undertakes to impose and prescribe unreasonable, unequal and unjust regulations of interstate commerce, that is to say, it subjects carriers engaged in interstate commerce by means of the transportation of property from places in one State to places in another State by railway lines or routes, or partly by railway line or routes and partly by water, to rules, regulations, restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of the transportation of the same kind of property between the same places, by means of water lines or routes.

(2) The said Statute is an unreasonable, unjust and unequal regulation of interstate commerce, and is unconstitutional and void in so far as it undertakes to punish this defendant for acts done by its agents while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with the defendant corporation by means of an all-water line or route, would be entirely innocent.

(3) The said statute is unconstitutional and void in that it seeks to deprive this defendant corporation of its property without due process of law in violation of Article V of the amendments to the Constitution of the United States, by subjecting it to the payment of a pecuniary fine, for acts committed by its agents within the scope of their employment in which this defendant did not in any manner participate, thus imputing to the said corporation, and punishing it criminally for acts which it did not in fact commit.

(4) The provisions of section 1 of the said statute, that in construing and enforcing its provisions, the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier, upon which provision the validity of this indictment wholly rests, so far as it relates to the defendant corporation, infringes the rights, privileges and immunities of this defendant corporation under Article V of the Amendments to the Constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, and thus depriving it of property without due process of law; and the said provision is therefore unconstitutional and void.

(5) The Congress is without power, under the Constitution of the United States, to impute to this corporation the commission of a criminal offense and subject it to a criminal prosecution and punish-

ment by reason of the matters described and set forth in the indictment."

38 (6) The matters mentioned in the indictment, in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that the defendant is not bound by the law of the land to answer the same.

(7) The acts described and set forth in the first count do not constitute a crime under the laws of the United States.

(8) The acts described and set forth in the second count do not constitute a crime under the laws of the United States.

(9) The first count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(10) The second count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(11) The first count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(12) The second count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(13) The first count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(14) The second count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(15) The Elkins Law did not and was not intended by the Congress to apply to the offering, granting or giving of rebates, concessions or discriminations in respect to the transportation of property in interstate or foreign commerce transported prior to the time when the said amendatory statute went into effect; but applied, and was intended to apply, only to the offering, granting or giving of such rebates, concessions or discriminations in respect to the trans-

39 portation of property transported in such commerce after the said amendatory statute went into effect; and inasmuch as it does not appear from anything alleged in the first count that the sum therein stated to have been paid by the defendant on April 2, 1903, for and on account and by way of a rebate and drawback was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the first count do not constitute any violation of the Elkins Law.

(16) For the same reason set forth in the last preceding paragraph, and inasmuch as it does not appear that the sum alleged in the second count, that the payment therein stated to have been paid by the defendant "as and for an unlawful rebate, concession and discrimination," was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the second count do not constitute any violation of the Elkins Law.

(17) The failure to allege the time when the shipments of sugar

mentioned in the first count were made, or to state whether the same were made before or after the going into effect of the Elkins Law, renders that count invalid since without such specification the defendant is not informed and the court cannot know the state of facts upon which the court will be called to apply the law of the case.

(18) For the same reason the failure to allege the time when the shipments of sugar mentioned in the second count were made, renders that count invalid.

(19) The payment by the defendant on April 2, 1903, of the sum in the first count alleged to have been paid for and on account and by way of a rebate and drawback did not constitute a viola-
40 tion of any statute or law of the United States at that time in force.

(20) The payment by the defendant on April 2, 1903, of the sum in the second count alleged to have been paid as and for an unlawful rebate, concession and discrimination, did not constitute a violation of any stat-e or law of the United States at that time in force.

(21) The facts set forth in the first count do not constitute a crime, since it is not alleged that the payment therein alleged to have been made by the defendant was made in respect of the transportation by the defendant of the sugars therein mentioned, or of any of the property, in interstate commerce.

(22) The facts set forth in the second count do not constitute a crime, since it is not alleged that the sum therein alleged to have been offered, granted and given by the defendant as and for an unlawful rebate, concession or discrimination, was offered, granted or given in respect of the transportation of property in interstate commerce, or that it was given in respect of any particular transaction or matter.

(23) The acts alleged in the first count do not constitute any violation of the Elkins Law by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(24) The acts alleged in the second count do not constitute any violation of the Elkins Law by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(25) The absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set
41 forth in the first count renders that count invalid.

(26) The absence of any allegation that advantage was given or discrimination practiced by reason of the matters set forth in the second count renders that count invalid.

(27) The acts alleged in the first count to have been done after the going into effect of the Elkins Law, constitute no violation of the provisions of that statute.

(28) The acts alleged in the second count to have been done after the going into effect of the Elkins Law constitute no violation of the provisions of that statute.

(29) The acts alleged in the first count do not constitute any vio-

lation of the Elkins Law in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

(30) The acts alleged in the second count do not constitute any violation of the Elkins Law in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

(31) This defendant is incapable of committing any crime by reason of the matters set forth in the first count.

(32) This defendant is incapable of committing any crime by reason of the matters set forth in the second count.

(33) More than three years have elapsed since the commission of any acts alleged in the indictment for which this defendant can be subjected to a criminal prosecution; and during all of said time the defendant has been a citizen inhabitant and actually resident of this District, and has been at all times within the jurisdiction of the court.

The Court denied the motion and the defendant excepted.

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Mr. Wise opened the case to the jury.

The defendant, asserting that the indictment was in respect to the matters presently indicated, indefinite and uncertain, and did not inform the defendant of the precise character of the crime which it sought to allege, then moved that the District Attorney be required to inform the defendant whether it was charged in the indictment with the giving of rebates under the Act of February 19, 1903, or with having wilfully failed strictly to observe the tariff rate under that Act; or whether the indictment charged the defendant with a violation of the Act of February 19, 1903, or of the Act to Regulate Commerce which the Act of February 19, 1903, amended and to a certain extent superseded.

The court denied the motion and the defendant excepted.

The defendant then asked the Court to inform the defendant what its view was as to the nature of the crime charged in the indictment, so that the defendant might proceed intelligently with the trial and with knowledge of the court's view in that regard.

The court refused to give such information, and the defendant excepted.

The Government to maintain the issues on its part then called as a witness GEORGE T. ROBERTS who testified:

I am assistant auditor of the Interstate Commerce Commission, and have charge of the tariffs and joint tariffs filed by common carriers engaged in interstate commerce in the United States. I have produced one of the tariffs filed by the New York Central and Hudson River Railroad Company and in effect during the year 1902. According to that tariff the rate on sugar in carload lots, in barrels and bags, from New York to Cleveland, over the New York Central and Hudson River Railroad and the Lake Shore and Michigan Southern Railroad in effect during the year 1902, was twenty-one cents per one hundred pounds. That was the only rate in effect on sugar over those roads during that year that I

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know of. That tariff was cancelled by another on January 1, 1903.

The tariff from Yonkers to Cleveland over the New York Central and Hudson River Railroad Company and the Lake Shore and Michigan Southern on sugar in carload lots, barrels or bags, during the year 1902 was twenty-one cents. The New York rate as named in this tariff applies on St. John's Park Station; Pier 4, East River; Barclay Street Station; 33rd Street Station; 60th Street Station, North River; from sugar refineries; from Palmer's Dock, foot of North 6th Street, Brooklyn, E. D.; from the foot of Bridge Street, Brooklyn, and from forwarding stations of Brooklyn Wharf and Warehouse Company, Brooklyn; from Long Island City,
44 N. Y., where coming from points beyond on Long Island Railroad; from Warren Street, Jersey City; also from stations on the Hudson Division of the New York Central and Hudson River road. That tariff as filed does not include a map of the lighterage district of New York. New York did not include Yonkers. The District Attorney then offered in evidence that part of the tariff produced by the witness in reference to the rate from New York City to Cleveland and from Yonkers to Cleveland, and the same was received in evidence and marked Exhibit 1.

The defendant here admitted (for the purpose of the trial only) that the following facts had been established on the part of the United States beyond a reasonable doubt:

At all the times mentioned in the indictment the New York Central and Hudson River Railroad Company was, and still is, a railroad corporation duly organized under and existing by virtue of the laws of the State of New York, and was engaged in the operation of lines of railway extending from the City of New York to the cities of Buffalo and Niagara Falls, all of which cities are in the State of New York, and was at all the said times a common carrier engaged in the transportation of passengers, freight and property for hire over the said lines of railway between the places last before mentioned.

At all of the said times the Lake Shore and Michigan Southern Railway Company was, and still is, a corporation duly organized and existing under the laws of the State of New York, and was engaged in the operation of a line of railway connecting with that of the aforesaid The New York Central and Hudson River Railroad Company at Buffalo, in the State of New York, and extending
45 from the said City of Buffalo, through the States of Pennsylvania and Ohio, to the City of Cleveland, in the State of Ohio, and at all the said times the said The Lake Shore & Michigan Southern Railway Company was a common carrier, engaged in the transportation of passengers, freight and property for hire over its said lines between the said last mentioned places.

That at all the said times The New York Central and Hudson River Railroad Company and the Lake Shore and Michigan Southern Railway Company had jointly established and were operating a continuous fast freight line or route known as the "Red Line" from the said City of New York in the State of New York, over the railroads aforesaid, by way of the Southern District of New York to the

City of Cleveland in the State of Ohio, and were engaged as common carriers in transporting freight on through way bills over said continuous line or route.

At all the said times the said The New York Central and Hudson River Railroad Company had established and had filed with the Interstate Commerce Commission and had published a joint tariff of the rates, fares and charges for the transportation of passengers and property over the aforesaid continuous line or route from the said City of New York to the said City of Cleveland, and the said The Lake Shore & Michigan Southern Railway Company had filed with the said Interstate Commerce Commission a written concurrence in the said joint tariff, and the said joint tariff so as aforesaid filed, published and concurred in by the said railroad companies plainly stated the places upon the said railroads, between which property and passengers would be carried, and contained the classification of freight at said times in force.

46 At all the times mentioned in the indictment the rates set forth in the said joint tariff so established, filed, published and concurred in, as aforesaid, to be charged for the transportation from the said City of New York to the said City of Cleveland over the said continuous line and route upon carload shipments of sugar in barrels or bags was twenty-one cents for each one hundred pounds thereof.

At all the times mentioned in the indictment The American Sugar Refining Company was a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

That between the 24th day of July, 1902, and the sixth day of December, 1902, the various consignments of sugar mentioned in the indictment, amounting to 69,944,966 pounds of such sugars, were delivered by the American Sugar Refining Company to the said The New York Central and Hudson River Railroad Company, for shipment in carload lots, in bags or barrels, and the said sugars were prior to January 1st, 1903, transported by a continuous through haul and movement on through waybills, said waybills being in the form annexed, over the said continuous line or route known as the "Red Line" from the said City of New York to the said City of Cleveland, and prior to that date the full tariff rate thereon, and no more, was paid by The American Sugar Refining Company.

That thereafter, and prior to January 1, 1903, Lowell M. Palmer, purporting to act on behalf of the said The American Sugar Refining Company, filed claims with the said The New York Central & Hudson River Railroad Company for the sum of six cents for each one hundred pounds of sugar so shipped and transported, as

47 aforesaid, over the said continuous line or route, to the said City of Cleveland, for re-consignment to points beyond said City, and for the sum of four cents for each one hundred pounds of the sugar so shipped and transported, as aforesaid, over the said continuous line or route, to the said City of Cleveland to go no further; the said claims were so filed on January 13th, 1903, and bore the following serial numbers and were for the following amounts:

Numbers.	Amounts.
30240	$2,254.18
30562	11,201.08
30975	10,707.81
31530	5,608.29
31874	9,672.94

That on the 27th day of March, in the year of our Lord one thousand nine hundred and three, the said The New York Central and Hudson River Railroad Company, in the Southern District of New York, gave to the said Lowell M. Palmer, on account of the said claims above mentioned, a draft to his order for the sum of $26,141.81, which was liquidated out of the funds of said Railroad Company.

Mr. Wise then offered in evidence the waybill referred to in the admission, and the same was received, without objection, and marked Exhibit 2.

Further to maintain the issues on its part the Government called as a witness ALAN MCMICHAEL, who after testifying that he was chief clerk to F. L. Pomeroy, the freight traffic manager of the New York Central and Hudson River Railroad Company, produced and identified certain papers which were marked for identification Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, respectively.

Being cross-examined by Mr. Fox the witness testified:

William H. Newman was the president of the defendant in
48 1902 and 1903. He had a private secretary named William Hutchinson. There were five or six vice-presidents of the defendant during that period. The freight department handled a very large volume of freight, involving the making of a vast number of contracts all the time, and involving the carriage of a great many different kinds of freight. There was also a Board of Directors of the defendant numbering a dozen or more during that period controlling the corporate action of the defendant.

The defendant here admitted (for the purposes of the trial only) that the following facts were proven beyond a reasonable doubt; that is to say:

That at a regular meeting of the Executive Committee of the Board of Directors of The New York Central and Hudson River Railroad Company, held September 28th, 1887, Nathan Guilford was duly appointed General Traffic Manager of The New York Central and Hudson River Railroad Company, and that he continued in such position until May 11th, 1898, when he was duly appointed at a regular meeting of the Board of Directors of said Company to be General Freight Traffic Manager, and that as such General Freight Traffic Manager he was charged with the general supervision of all freight traffic matters of said Company, that he held such position and performed said duties from thenceforth until February 1st, 1905.

That subject to the approval of the Executive Committee of the Board of Directors, the President of the said Company had at all the

times mentioned in the indictment general power to appoint such officers and assistants as he might require, who should perform such duties as from time to time might be assigned to them by him; that at no time had the Board of Directors, or the Executive Com-
49 mittee, or the President of said Company, by any resolution or executive order, created any such position as Assistant General Traffic Manager, or Assistant General Freight Traffic Manager, or Assistant Freight Traffic Manager; that on February 1st, 1901, Mr. Fred L. Pomeroy, was, by said Nathan Guilford, Traffic Manager, appointed Assistant Traffic Manager of said Company, and that said appointment was made with the sanction of the President; and from February 1st, 1901, to June 30th, 1904, said Fred L. Pomeroy was recognized by the said company and its officers as such Assistant Traffic Manager, but that no resolution of the Executive Committee or Board of Directors had ever been adopted creating such position or expressly ratifying such appointment.

That at the times mentioned in the indictment said Nathan Guilford, as General Freight Traffic Manager, and said Fred L. Pomeroy, as Assistant Freight Traffic Manager, or Freight Traffic Manager, were authorized to establish rates at which freight should be carried over the line of the New York Central and Hudson River Railroad Company, and to unite with other companies in the establishment, filing and publishing of through rates, including the through rate or rates between New York and Cleveland referred to in the indictment.

The defendant further admitted that certain papers then produced by the District Attorney were correct copies of resolutions of the Company, and the same were offered and received in evidence and marked Exhibits 13, 14, 15, 16 and 17 respectively.

The defendant further admitted that there were no minutes of the stockholders, directors, or Executive Committee, or executive
50 orders, since September 28th, 1887, other than Exhibits 13, 14, 15, 16 and 17, creating any of the before-mentioned positions or defining the functions and duties of such officers; and that the Guilford and Pomeroy mentioned in the foregoing admission and exhibits were the same Guilford and Pomeroy mentioned in the papers which had been produced by the witness McMichael, marked for identification Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

The Government further to maintain the issues on its part called as a witness FRED E. HURST who testified:

During 1902 and 1903 I was employed in the Sales Department of the American Sugar Refining Company, which was engaged in the refining and selling of sugar and in the shipping of sugar to various parts of the country, and among other places, to Cleveland, Ohio. I looked after the routing and the shipments from the Wall Street office, handled the orders that came in and looked after the fixing of the freight basis. I received instructions from Lowell M. Palmer's office at 184 Front Street, as to the route over which the sugar was to be shipped and the rate which it was to pay.

The Government further to maintain the issues on its part called as a witness LOWELL M. PALMER who testified:

During 1902 and 1903 I was one of the directors of the American Sugar Refining Company. I furnished to the sales department the rates at which sugar were to be shipped from New York by the Company over the different railroads. In the course of my business I routed and arranged the rate for pretty nearly all the shipments for the refineries of the Company which were situated either in
51 Brooklyn or Jersey City. It was also a part of my business to collect claims against the different railroads that handled this freight. I think the collection of these claims was entirely taken care of in my office. I had conducted this business and stood in this position with the Company during a long period of years and ever since its formation, and during all those years shipments were made by the Company according to the rates I made. My business was conducted at 184 Front Street. Thomas F. Riley was the head of the office under me. I had several clerks—W. J. Whitaker, F. M. Muench and H. P. Leeming. I had a bank account with the Market and Fulton Bank, in which it was my habit to deposit collections from the different railroads. I had no personal interest in that bank account. In 1902 and 1903 the rent and stationery, the salaries of these different employees, and other expenses of the business were paid out of that account. I have had occasion to discuss rates over the New York Central and Hudson River Railroad Company with Messrs. Guilford and Pomeroy, the Freight Traffic Manager and Assistant Freight Traffic Manager of that Company, and have arranged rates over that road with them. Those rates have subsequently been carried out by the railroad company. In 1902, the American Sugar Refining Company made large shipments to a warehouse in Cleveland, Ohio, known as the Merwin Street Warehouse. I remember having had an interview with Mr. Pomeroy in July, 1902, on the subject of shipments to that warehouse. I think the interview took place at his office. I could not state positively who was present. Exhibit 12 for identification is a memorandum of that interview. It was made in duplicate immediately after the interview at the office of Mr. Pomeroy. I have read Exhibit 12 for identification. It embodies the arrangement correctly.

52 The District Attorney offered the memorandum in evidence and it was received and marked Exhibit 12.

The WITNESS (continuing): I do not think I can state, absolutely, every one of the items of that agreement without the use of the memorandum. I can state them approximately. At that interview on July 24th, 1902, I stated to Mr. Pomeroy that commencing with about 1898 or 1899, we had made a contract with the Cleveland Steel Canal Boat Company for shipments of sugar by all-water route to Cleveland, that the agreement was in force until some time in 1902, and that they failed to keep their agreement. The boats didn't arrive in New York Harbor in time to make the shipments in accordance with the wants of the American Sugar Refining Company. There was at times very little sugar in the Cleveland warehouse, so

that customers could not be supplied, and that did damage to about $3,000. resulting in a lawsuit in which the American Sugar Refining Company, unfortunately was the defendant. I asked Mr. Pomeroy, after relating these circumstances, to make an all-rail rate that would enable us to continue our business at Cleveland. The fact is I thought he had a perfect right to make the rate in
53 competition with an all-water rate. Mr. Pomeroy listened to what I had to say. I think that is all that took place that I can remember. I cannot answer whether Mr. Pomeroy called in a stenographer and dictated a memorandum of the interview at that time in my presence. It might have been done that way. He may have written it out in a little memorandum himself. How it was done I couldn't answer, I do not remember any more of the facts which were discussed between me and Mr. Pomeroy than what I have just stated. I think that is all.

The WITNESS (continuing): The signature at the end of Exhibit 11 for identification is mine. I wrote that letter. Exhibit 18 for identification is the reply to it.

The defendant admitted that the signature "N. Guilford" to Exhibit 18 for identification was the signature of Nathan Guilford. The District Attorney offered Exhibits 11 and 18 for identification in evidence and the same were received and marked Exhibits 11 and 18 respectively.

The WITNESS (continuing): Mr. T. P. Riley was the Mr. Riley I have mentioned. He was present at that interview. No one
54 else representing the Sugar Company was there. I know that the regular tariff rate on July 24th, 1902, was 21 cents. I was in the lighterage business. That business represented an investment aggregating $4,500,000. We loaded the sugar when received from the refineries into cars, furnished tonnage for the loading of the sugar, and when loaded put the cars on floats and transported the cars to the *terminii* of the various trunk lines. It consisted of carrying the sugar from the docks in Brooklyn and Jersey City, where the refineries loaded the cars, to the terminals where the railroads desired them delivered. That business was carried on by me as a separate business. It had no connection with the Sugar Company. The firm of Havemeyer & Elder were my partners in that business. Mr. H. O. Havemeyer, one of the members of the firm, was the President of the Sugar Company on July 24th, 1902. The 4 1/5 cents lighterage mentioned in Exhibit 12 was a compensation which I received for transporting the shipments of sugar from the docks to the terminals on business west of Buffalo, Suspension Bridge, Niagara Falls, or Pittsburg. If on business up to those points, and east thereof, the rate was 3 cents. 4 1/5 cents was the regular charge I received in my lighterage business for transporting in lighters sugar destined for Cleveland. The net result of
55 this arrangement as to lighterage was that I was to receive 3 cents per 100 pounds for transporting the sugar from the docks in Brooklyn or Jersey City to the railroads. In other words, I was to be paid 4 1/5 cents per 100 pounds by the Central and 1 1/5

cents was to be paid back to them; and I thought it was fair, when I was asking the New York Central in making a rate in competition with the water rate, to carry that for a lower rate than provided in the contract, namely 3 cents, but it being very difficult to figure these Cleveland shipments by themselves, it was suggested that it go in as provided in the contract and render the contract price each month, and then I handed back that amount each month, in view of the competition they were making on the all-water rate. The American Sugar Refining Company received an allowance for cartage or transfer on all all-rail shipments of sugar for points anywhere in the United States, so that at that time, whenever it shipped sugar by rail from New York to points west it received back 2 cents per 100 pounds; and the arrangement mentoned in my letter involved the American Sugar Refining Company giving up that allowance. My understanding of the arrangement is that a claim was to be made by me under the 5th clause of the memorandum for 6 cents from the 21 cents mentioned in the 1st clause. No overcharge over the published tariff was contemplated. Mr. Guilford was away on July 24th when this arrangement was made with Mr. Pomeroy. The letter I wrote to him on November 18th (Exhibit 11) was my way of submitting to him the question which was left open by the arrangement. After his return I received Exhibit 18 which was his reply to my letter. No further correspondence in regard to the subject left to him took place after this The sugar mentioned in the
56 interview and in these lettes all came from the American Sugar Refining Company at Brooklyn and Jersey City. The endorsement on the back of the draft now shown me is the stamp that was used in my office in 1902 and 1903, and the Market & Fulton Bank mentioned in the endorsenent is the bank in which I had the account regarding which I have testified. That account is the only one I had in that bank.

The draft was marked Exhibit 19 for identification.

Being cross-examined by Mr. Foxthe witness testified: During all the time to which my attention has been directed there was an all-water route from New York and from Brooklyn to Cleveland, and by that route the American Sugar Refining Company was shipping very largely in 1900 and 1901. In 1902 the Company shipped something over 18,000 tons by water routes, and I think that was continued through at least a part of1903. All this sugar, the transporting and alleged overcharge in regard to which is involved in this indictment was put into cars onland within the limits of Brooklyn, on the West Shore road, the place on shore where the sugar was put into the cars was three blocks from the water front; on the New York Central one block. And thenin every instance that sugar was carried in those cars to Cleveland without change. I never had any conference or conversation on this subject with any officer of the defendant except Mr. Guilford and Mr. Pomeroy. I am inclined to think there was a conference with Mr. Guilford before he went away, but that is a matter of impression, and I cannot at this time testify definitely to any conference with anyone except Mr. Pomeroy. I

testified to all that I recollect on the subject when I testified
57 as to what took place between Mr. Pomeroy and myself. I think there was a conversation with Mr. Guilford, but it did not cover any arrangement. I never had any letter from the President or officer of the defendant relating to this matter except the letter from Mr. Guilford (Exhibit 18), and I never showed Mr. Guilford's letter to any officer of the defendant.

The defendant here admitted (solely for the purposes of the trial, however) that the claims referred to in the defendant's previous admissions were, after being audited, destroyed in the regular course of business, and were not then available either to the Government or to the defendant, that these claims were audited by the different auditors representing the lines against which the claims were made, and in the case of a claim against the New York Central and Hudson River Railroad Company were audited by a travelling auditor representing that Company; and that the claims referred to were stated to be, and on their face purported to be, claims for overcharges at the rate of 6 cents for each 100 pounds of shipment.

The Government, further to maintain the issues on its part called as a witness HARRY T. LEEMING who testified: In 1902 and 1903 I was in the office of Lowell M. Palmer. I remember certain claims that were prepared against the New York Central and Hudson River Railroad Company.

The defendant here admitted that the claims referred to by the witness were made up by him, in the ordinary course of his duty, in accordance with Mr. Palmer's understanding as to the amount, and were presented to the defendant by Mr. Palmer, that they were subsequently withdrawn and re-adjusted in accordance with Mr. Guilford's final determination and that the payment of $26,141.81 represented by Exhibit 19 for identification was a payment on
58 account of these claims, readjusted on the basis of 6 cents per 100 pounds for all shipments which went to Cleveland, and were re-consigned to points beyond, and 4 cents on the sugar that was delivered locally in Cleveland, and that Exhibit 19 for identification was liquidated out of the funds of the defendant.

The District Attorney offered in evidence Exhibits 3, 4, 5, 6 and 9 for identification, which letters defendant admitted to be letters from the office of Lowell M. Palmer.

The defendant objected to their admission on the ground that the declarations of the witness Palmer were irrelevant and inadmissible under any allegations of the indictment. The objection was overruled and the exhibits were admitted and marked Exhibits 3, 4, 5, 6 and 9, respectively. The defendant excepted.

The District Attorney offered in evidence a letter dated March 23, 1903, from the witness Palmer to Mr. Pomeroy which had been produced by the defendant. The defendant objected to the admission of the letter on the ground that Palmer's declarations were irrelevant and inadmissible as against the defendant. The objection was over-

ruled and the letter was admitted and marked Exhibit 20. The defendant excepted.

The District Attorney offered in evidence a copy of a letter produced by the defendant the original of which defendant admitted was addressed to L. M. Palmer, and signed F. L. Pomeroy, dated Nov. 24th, 1902, and another copy of a letter produced by defendant dated March 21st, 1903, the original of which defendant admitted was addressed to L. M. Palmer and signed F. L. Pomeroy. The defendant objected to their admission on the ground that the declarations of Mr. Pomeroy were irrelevant and inadmissible to bind it, that no authority was shown on the part of Mr. Pomeroy to bind the defendant by any unlawful act, and that Mr. Pomeroy's
59 declarations were irrelevant and inadmissible on the question of the guilt of the defendant.

The objection was overruled and the two papers were admitted and marked Exhibits 21 and 22, respectively. The defendant excepted.

Mr. Wise read to the jury Exhibits 3, 4, 5, 6, 7, 9, 20, 21 and 22.

The examination of the witness Leeming being resumed he testified further: I was familiar with all these claims as to which letters have just been read. I handled those claims. I prepared them on the readjusted basis referred to in the letter from Mr. Pomeroy. At the time I prepared these claims I did not have any evidence before me of any loss or damage on account of these shipments, nor did I have anything before me showing that any amount had been paid on account of any of the shipments in excess of the tariff rate.

The District Attorney offered in evidence Exhibit 19 for identification. The defendant conceded that the exhibit was the draft mentioned in its admission, and was liquidated out of the funds of the defendant. The draft was received in evidence, marked Exhibit 19, and read to the jury.

60 The Government here rested.

The defendant moved that the jury be directed to acquit the defendant upon the ground that the court was without jurisdiction to punish the defendant for any offense toward which the evidence was addressed or alleged in the indictment, it appearing by the evidence that the transportation of all the goods mentioned in the indictment, or as to which any evidence had been adduced was begun and completed before the passage of the Act of February 19, 1903, that at the time the transportation was made and completed it was not a criminal offense for a corporation to give or pay a rebate, or do any of the acts referred to in the indictment, or as to which any evidence had been adduced; and that the Act of February 19, 1903, did not apply and was not intended to apply to any of the acts therein specified, done or omitted in respect of the transportation of property in interstate commerce at any time prior to its taking effect, but applied and was intended to apply only to the acts therein specified when the same should be done or omitted

in respect of the transportation of property in interstate commerce after its taking effect.

The court denied the motion, saying:

"I have considered this law and I do not think that I need hear the District Attorney upon it. I concur with the counsel who has spoken in the fundamental proportions put forward. No corporation could be proceeded against criminally before the Elkins Act, and therefore this prosecution must find its justification in the provisions of the Elkins Act. And of course the general proposition of law is fundamental that no person can be held for a crime except
the crime is established by law, and in the United States
61 court by statute, and affirmatively no legislation, particularly
criminal legislation, should be held to be retrospective. The question is as to the language of the Elkins Act. The first sentence is this: 'That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under the said Act or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Act or by this Act with reference to such persons except as such penalties are herein changed.'

Now under the Interstate Commerce Act, one of the provisions of the Sixth Section is this: 'It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time.'

In the Tenth Section it is made a misdemeanor for any common carrier subject to the provisions of the Act—meaning an individual common carrier—'or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who
alone or with any other corporation, company, person, or
62 party, shall wilfully do or cause to be done, or shall willingly
suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful."

Therefore, by this First Section, any act done by a corporation which, if done by any director or officer thereof, would be a misdemeanor, is made by the first sentence a misdemeanor. Upon the evidence in this case under the Interstate Commerce Act it would be a proper question for the jury whether Mr. Guilford or Mr. Pomeroy had not committed a misdemeanor, and therefore, by this first provision in the Elkins Act in my opinion it is a question for the jury whether the corporation upon the same evidence has not committed a misdemeanor, and particularly in view of the provisions in

the second paragraph of the Act that: 'In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person, acting for or employed by any common carrier acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person.'

Mr. Guilford and Mr. Pomeroy were acting within the scope of their employment. They were Traffic Managers of the road and they had authority by virtue of their general position to make contracts for traffic. They were, therefore, the persons for whose acts, in accordance with the provisions of this act, the corporation was responsible, and unless there is something in the subsequent provisions of the Elkins Act affecting the specific language of this first sentence, I do not see why that first sentence does not of itself create a misdemeanor which would be complete and perfect if there was nothing else added to the Act. Of course, there may be
63 something later which would affect it, but if not that is one view.

Then comes this second sentence: The wilful failure upon the part of any carrier subject to said act to file and publish the tariffs and rates and charges as required by said act, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the crime is fixed.

That is a complete sentence, a complete provision and constitutes a complete act of Congress as though passed separately and alone, and in my opinion there is evidence in this case to go to the jury as to whether there has been a wilful failure on the part of this carrier to strictly observe the tariffs published, at the time that the rebate was paid.

I think, therefore, on these first two grounds there is sufficient evidence in this case to go to the jury.

Then comes the provision which has been particularly adverted to: It shall be unlawful for any person, persons, or corporation, to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce. So far there is nothing with reference to the future. 'In Interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed by such carrier as is required by said Act to regulate commerce and the acts amendatory thereto.' *Whereby any such property shall be transported at a less rate than that named.* That is by means of a rebate, con-
64 cession or discrimination any such property be by any device taken or transported at a less rate. In my opinion the words: 'Shall be transported' do not relate to the future of the transportation. They relate to the determination of the question after the rebate is paid whether it produces a less rate than that named in the tariff. That is the rebate, concession or discrimination, the various words used there mean to cover any form in which it may

be attempted to bring about a payment of a less rate than the tariff rate, and the sentence means, in my opinion that when this payment of rebates or discrimination is given effect to, if then, taking those facts into consideration, the result is that the property has been transported at a less rate than that named in the tariff, then the giving of such rebate constitutes a misdemeanor under that Act.

The phrase beginning: 'Whereby any such property shall be transported,' don't relate to the transportation of the property. It relates to the rebates which are to be given in my opinion. The whole legislation upon the subject treats the payment of the rebate as the essential crime. Perhaps the charging of the making of an agreement under this act, or the charging of the demand of payment by the carrier under the previous act, and the transportation of the property under a contract to give a rebate is not made an offense, or is not prohibited. The Chesapeake & Ohio case, and the case Mr. Choate referred to, of the Texas Pacific against Mugg all held that a contract of that kind made to give a rebate is not illegal and the parties can go on and ship the goods and if they pay the full rate there is nothing illegal so far in that notwithstanding they have made a previous contract and the road can demand the full payment if it sees fit, and that the making of the previous contracts are annul-ed by the operation of the law, even if accepted when made. So that it seems to me that the whole theory of this legislation is to make it an offense to pay a rebate, or to pay less than the schedule price. I do not see why Congress would not have power. Of course the difficulty of construing the statute as Mr. Choate suggested, as if it was an original act, is that there could not be any agreement about enforcing the schedule until there was some legislation to that effect. The original Act required that schedules should be posted, and this Elkin's Act is obviously an amendatory Act which leaves the original Act in full force except so far as it is changed, and the change it makes is to provide that a corporation will be proceeded against criminally which could not be done before, and that anybody proceeded against criminally shall be punished by a fine instead of the officers of the corporation by imprisonment, but the requirement to file a schedule exists today under the original act and not under this amendatory act, and it is perfectly competent in my opinion for Congress to have said by this Act it shall be a crime for any person who has shipped goods in the past and agreed to take a rebate on it, if you hereafter pay a rebate differing from the amount fixed by the schedules. I do not see why it is not competent to do so. I deny the motion on the ground you now state.

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The defendant excepted.

The defendant then moved that the court direct the jury to render a verdict of acquittal on each of the following grounds.

1. That there was no evidence in the case tending to show that at any time after the going into effect of the Act of February 19, 1903, there was any wilful failure on the part of the defendant strictly to observe the published tariff rate in re-

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spect of the transportation of any property which was transported after the going into effect of the Act.

2. That there was no evidence showing or tending to show that at any time after the passage of the Act the defendant was guilty of any violation of the Act in respect to the payment or giving or offering of any rebate made punishable under its provisions.

3. That there was no evidence in the case showing, or tending to show the commission within the Southern District of New York, or within the jurisdiction of this court, of any violation of the Act.

4. That the indictment charged no violation by the defendant of the Act, or of any other statute of the United States.

The court denied the motion and the defendant excepted.

The defendant here rested.

Counsel for the respective parties having summed up the case, the court charged the jury as follows:

Gentlemen of the jury:

The defendant in this case is indicted for a violation of the Act of 1903, commonly called the Elkins Act. That Act is an amendment of the Act of 1887 entitled an Act to Regulate Commerce, commonly called the Interstate Commerce Act and the Acts amending it.

The original Interstate Commerce Act provided that every common carrier carrying on commerce between the States, either alone or by a joint traffic arrangement with connecting roads,
67 should print and keep open for public inspection, schedules showing the rates of fares and charges for transportation of passengers and property which any such common carrier has established and which are in force at the time. There are various provisions in detail contained in the Act with reference to these schedules. They are to be filed in the office of the Commission of Interstate Commerce and posted in the stations of the roads, and deviation from these scheduled rates are declared to be illegal. When any such common carrier shall have established and published these rates, fares and charges in compliance with the provisions of this section the Act provides that "it shall be unlawful for such common carrier to charge, demand collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time."

Then the Act contains other provisions in regard to the prevention of making discriminations between shippers, but the original act did not provide that any railroad corporation could be indicted and criminally punished for any violation of its sections, but provided that any individual carrier could be, and that any officer or agent of any corporation who violated any of the provisions of this act could be proceeded against criminally. It provided for various civil proceedings, suits in equity and otherwise, against the corporation; some proceedings to be brought by the Interstate Commerce

Commission and some by suits at the instance of individuals who claimed to have been injured by the action of the corporation in violation of the act; but the original act did not contain any
68 provision under which the corporation as such could be indicted.

Then the Elkins Act was passed, which is to be regarded as an act amending the original act, and it provided in substance this: That any act done by an officer or agent of a railroad corporation, which would be a misdemeanor under the previous act if done by an officer or agent acting in the regular course of his employment, would be deemed to be a misdemeanor on the part of the corporation. Of course in the case of the defendant in this case, if a passenger agent or a person having nothing to do with the traffic department of the business should make a contract for rebates on the carriage of freight, the corporation would not be bound by it; but if the contract is made by an officer or agent of the company acting within the scope of his employment, the corporation is bound.

The Act says: "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person."

So the first sentence or section provides that an act done by such officer or agent which would be a misdemeanor under the original act, shall be a misdemeanor by the corporation under the Elkins Act.

Then it provides in the second sentence or section that "the wilful failure on the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law,
69 shall be a misdemeanor," and then in the third sentence or section it provides that "It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto."

Now the indictment in this case charges in substance and the evidence tends to show, that the defendant The New York Central & Hudson River Railroad Company was a corporation and common carrier transporting merchandise from New York to Buffalo; that it had a joint traffic arrangement with the Michigan Central from Buffalo to Cleveland under which freight was shipped from New York to Cleveland under a through continuous bill of lading; that The American Sugar Refining Company, a corporation doing business in the neighborhood of New York with refineries in Brooklyn and Jersey City, through Mr. Lowell M. Palmer, one of its directors and a gentleman who was a member of the firm which had charge of

the business of fixing rates and traffic arrangements of the sugar sold or shipped by The American Sugar Refining Company, made an arrangement with Mr. Pomeroy, the Assistant Traffic Manager of the defendant, which was later modified by Mr. Guilford the traffic manager; that under that arrangement it was provided that all sugar that should be shipped to Cleveland should be shipped at the
70 regular tariff rate and paid for at that rate, and that there should be a rebate on all such sugars at the rate of 6 cents per 100 pounds. You will remember gentlemen the memorandum which has been read to you which Mr. Palmer said was made when they had this interview. He gave the grounds why he asked for the reduction of the rate, and said that thereupon it was conceded, and he said this memorandum was a correct statement of what was agreed upon at that time.

Among other provisions of this memorandum is this: Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on shipments of sugar to Cleveland as covered by the first clause in this memorandum on the basis of 6 cents per 100 pounds. The first clause states, shipments to be billed from New York regular tariff rate, of 21 cents per 100 pounds.

Now the evidence in the case is that subsequently a very large amount of sugar was shipped. I think the evidence is some 69,000,000 pounds. That computations were made of the overcharge as called here of 6 cents each 100 pounds and sent to the New York Central & Hudson River Railroad Company and that, after an examination by the proper officers and after correction of the amounts originally calculated, and some negotiations upon the subject, a check for some $26,000 was drawn and paid, which has been offered in evidence before you.

Now gentlemen, no evidence has been offered on behalf of the defendant in the case, and I understand from the argument of counsel that the defendant's defence in the case is the denial of any criminal intent. Gentlemen, intent is essential to the establishment of any charge of crime. Of course there may be legitimate
71 overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause. That is the simple question in this case for you to determine and that question I leave for you to pass upon upon the consideration of all the evidence in the case.

I have been handed a number of requests to charge in this case.

The defendant requests the Court to instruct the jury:

1. "That upon all the evidence it is the duty of the Jury to render a verdict of not guilty."

I decline to so charge.

2. "That in order to justify a verdict of guilty against this defendant it is not enough for the Government to prove that an agent or agents of the defendant offered to give or did give a rebate on sugar carried by this defendant."

I so charge, gentlemen, if this rebate was given for any legitimate purpose you will acquit the defendant, but if it was not given for any legitimate purpose, but was given as a pure rebate in violation of the law upon that subject, then you should convict the defendant, if you find the other elements of the case sufficient in other respects.

72 3. "That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors or any officer beyond the agent who gave the rebate, then the defendant should be acquitted."

I understand that to raise the point whether a corporation must be held criminally liable for the acts of its agents?

Mr. Fox: It means exactly what I have written and I think I am entitled to have it charged without modification or have it refused. I mean that is my position.

The Court: The Elkins Act provides in the language which I read to you that a corporation can be held criminally responsible if its officer would be held criminally responsible for the same act. "In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such common carrier as well as that of the person."

That is not the section I had in view. It is the first section. "That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a

73 misdemeanor committed by such corporation."

That is the law applicable to this case and I therefore decline to charge this Third request as it is stated.

4. "That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation."

I decline to charge that in the language as put, on the ground of the section of the statutes which I have just read.

5. "That in order to prove that the defendant authorized the giving of a rebate it is not enough for the Government to prove merely the giving thereof by an agent or agents of the defendant together with the fact that thereafter certain claims were presented and paid

out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo."

I so charge Gentlemen. It is not enough to prove simply the payment of money by the defendant. It must be proved beyond a reasonable doubt to your satisfaction that it was paid with a criminal intent to violate this law.

6. That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive offi-
74 cers, except said agent, then the defendant must be acquitted."

I decline to so charge.

7. "That it is not for the defendant to prove a negative and show that it did not authorize or know of the giving of a rebate, but it is for the Government to show such authority and to show it beyond a reasonable doubt, and no unfavorable inference must be drawn against the defendant because it called no witnesses."

I so charge.

8. "That the burden of proof is not upon the defendant to show affirmatively that no advantage was given in favor of or a discrimination practised against any shipper or consignee other than those named in the indictment, but the burden of proof is upon the Government to show that fact, if it be true."

Gentlemen, I charge you in that respect that you can find a verdict of guilty in this case if you find that the defendant received less than the published tariff rate, if the evidence establishes that fact in your opinion and the amount was received with the intention to contravene the provisions of the Interstate Commerce Act and the Acts amending it.

Mr. Fox: Does your Honor decline to charge No. 8 itself?

The Court: Well, "The burden of proof is not upon the defendant to show affirmatively that no advantage was given in favor of or a discrimination practised against any shipper or consignee other than those named in the indictment."

I charge that. The burden of proof is upon the Government to show that fact if it be true. I decline to charge in the lan-
75 guage put. If the Government establishes that this railroad company received less than its published rates with guilty intent, the jury can find a verdict of conviction whether there was any proof of discrimination, or any proof that any other person dealing in sugar was charged greater rates or not.

Mr. Fox: How much does Your Honor really charge? It seems to me in doubt.

The Court: I think you will have to read the report. I have tried to be exact.

Mr. Fox: You said you would not charge it as a whole and apparently did charge a part of it.

The Court: I said that I charged the part down to the word "Indictment," and the rest of it I do not charge in the language as stated.

9. "That the jury must not speculate or guess on the question whether any advantage was given to or discrimination practised against any shipper or consignee other than those named in the indictment and if the jury find as a fact that there is no evidence one way or the other on that question, then the defendant must be acquitted."

Well, I charge the first part of that down to the word "Indictment," and I refuse to charge the rest of it.

I refuse the next proposition as requested.

10. "That the Government having failed to prove that any advantage was given to any one mentioned in the indictment, or that discrimination was practised in favor of or against any other shipper or consignee by reason of the giving of the alleged rebate, the defendant must be acquitted."

I refuse so to charge.

11. "That before the jury can find this defendant guilty
76 of giving an unlawful rebate, they must find as a fact from the evidence and find beyond a reasonable doubt that in the giving of the alleged rebate the defendant did thereby give some advantage to or practised some discrimination in favor of or against some other shipper or consignee than the one mentioned in this indictment."

I decline to so charge.

12. "That the element of advantage or discrimination is an essential element of the crime of giving a rebate and as the indictment omits to allege this element it fails to charge a crime and the defendant must be acquitted."

I decline to so charge.

13. "That even if the jury find a criminal intent in an agent or agents of the defendant the jury cannot impute that intent to the defendant."

I decline to so charge.

14. "That the jury cannot make a finding of criminal intent against the defendant and base that finding solely on a finding of criminal intent in an agent or agents of the defendant."

I decline to so charge.

15. "That the defendant can in no event be convicted of a criminal intent to commit the crime of giving a rebate."

I decline to so charge.

16. "That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity or by direction of those controlling its corporate action it gave or authorized the giving of the rebate charged in the indictment."

I decline to so charge. If by the company this request is
77 meant that those controlling its corporate actions means any officer or person other than Guilford or Pomeroy.

17. "That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted."

I decline to so charge, understanding by the term those who control the corporate action to mean the Board of Directors, or the immediate officers other than Guilford and Pomeroy.

18. "That the defendant cannot be found guilty unless the evidence shows that sugar was carried for other shippers over the route named in the indictment on terms different from those given to the shippers named in the indictment."

I decline to so charge.

19. "That there is no evidence that sugars were carried for other shippers over the route between New York and Cleveland named in the indictment on terms different from those on which the sugars mentioned in the indictment were carried."

I think that is so gentlemen, but it is for you to say.

20. "That the jury cannot find the defendant guilty upon a finding that the defendant after the fact, ratified or approved of the giving of alleged rebates."

I decline to charge that request in the language in which it is put.

21. "That even if the jury find as a fact that an agent or agents of the defendant gave a rebate as alleged in the indictment and
78 that thereafter such rebate was paid by or through other agents of the defendant corporation in Buffalo, still these facts are not of themselves sufficient to warrant a verdict of guilty against the defendant."

Well, I will charge that. There must be proof sufficient to satisfy you of a guilty intent. If it is meant by that that the acts of Pomeroy are not sufficient and there must have been an action on the part of the Board of Directors I decline to so charge.

Mr. Fox: Are we not, with entire respect to The Court, entitled to have that proposition charged if it be sound and means just what it means, with no modification. Either charged or refused, because I do wish the jury to understand precisely where we stand.

The Court: I think I make it clear. I do not think it is unusual.

Mr. Fox: No, it is not. I am only speaking if I were a juror I would like to know whether Your Honor charges No. 21 as an absolute proposition of law or not.

The Court: I think I might be mistaken if I said I charged or refused to charge it without further comment, and I have commented upon it for the purpose of explaining the meaning which I gave to it, and I think it was entirely within the line of proper charging in that respect.

Mr. Fox: It was not a criticism but a prayer on my part. Your Honor declines to charge it as presented?

The Court: Yes, I decline to charge it as presented and I charge subject to the remarks which I have made about it.

22. "That there is no evidence that those who controlled the corporate action of the defendant authorized or knew of the
79 giving of the rebate alleged in the indictment."

I charge that if by controlling the corporate action is meant the directors or officers other than Guilford and Pomeroy.

23. "That there is no evidence that the defendant or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the government has asked.

I so charge.

24. "The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

I decline to so charge.

25. "That there is no presumption that any other shipper was refused the same rate that it is charged was given to the shipper mentioned in the indictment."

I so charge.

26. "That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy and that as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation then the defendant must be acquitted."

I decline to so charge.

27. "That in order to find that an agent or agents of the defendant was or were acting within the scope of his or their employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent or agents had authority to establish lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment."

I decline to so charge.

28. "There is no presumption that the defendant gave any of its agents authority to give any rebate, concession or discrimination charged in the indictment."

I so charge.

29. "The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment."

I decline to so charge. I do not think there is any legal presumption about it one way or the other.

30. "The presumption is that the defendant gave no direction or authority to any of its agents to commit an offense against the United States."

I decline to so charge. I do not think there is any question of presumption any way in the matter.

32. "The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States."

I decline to so charge, and leave it expressly to the jury.

34. "That in order to find the defendant guilty the jury must find that the evidence shows beyond a reasonable doubt that the defendant itself was guilty of a criminal intent separate and distinct from any criminal intent of any agent or agents of defendant whom the jury may find gave the rebate charged in the indictment."

I decline to so charge.

35. "That even if the jury find that some agent or agents of the

defendant gave the rebate charged in the indictment and acted with criminal intent in so doing, yet the jury must not impute
81 such criminal intent to the corporation merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant."

I decline to so charge.

36. "The defendant is entitled to the presumption of innocence and this presumption must be borne in mind in the consideration of every feature of the case."

I so charge.

37. "Even if the defendant can be guilty of a criminal intent, the jury cannot base a finding of such criminal intent solely on a finding of a criminal intent on the part of Fred L. Pomeroy."

I decline to so charge.

38. "The defendant cannot be convicted of a willful failure strictly to observe the published tariff rates by reason of anything done or omitted by it, or its agents, after the transportation of property was completed."

I decline to so charge.

39. "The alleged payment on April 2nd, 1903, did not constitute a failure on its part strictly to observe its published rate."

I decline to so charge. I leave that question to the jury.

40. "That the jury cannot find a verdict of guilty against the defendant, unless they find beyond a reasonable doubt that Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent."

I so charge.

41. "That if the jury entertain a reasonable doubt whether Nathan Guilford and Fred L. Pomeroy were guilty of any criminal intent then the jury must find a verdict of not guilty."

82 I so charge.

42. "That if the jury are unable to determine whether either Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent then the jury must find a verdict of not guilty."

I decline to so charge.

43. "That in determining whether Nathan Guilford or Fred. L. Pomeroy was guilty of any criminal intent the jury may take into consideration the fact there is no evidence that either one of them had any personal advantage to gain by the giving of the alleged rebate."

I so charge. Take it into consideration, gentlemen.

44. "That if the jury find as a fact that the language of the Elkin's Act is confusing, so far as it applies to the matters charged in the indictment, they may take that fact into consideration in determining the guilt or innocence of the defendant."

I decline to so charge.

45. "You must assume, there being no evidence to the contrary, that there were no "unpleasant incidents" of the transaction other than those which have been conceded by the defendant."

I so charge. You must find your verdict upon the evidence in the case, gentlemen.

Mr. Fox: I request Your Honor to charge: "46. You have a right

to take into consideration on the question of criminal intent the fact that if the payment had been made at any time before February 19th, 1903, when the Elkins Law went into effect, this defendant would not have been liable to indictment or prosecution therefor."

The COURT: Yes, I will so charge, that they can take it into consideration.

83 Before the jury retired and in their presence the defendant took the following exceptions to the charge:

Exception to the refusal to charge the first request submitted by the defendant.

An exception to the refusal to charge the second request submitted by the defendant and an exception to the modification made by the Court to the second request.

An exception to the Court's charging the jury that the provisions of the Act of 1887 on the subject of a deviation from the alleged tariff being illegal, and that part of the Act read by the Court to the jury therefrom, counsel for the defendant contending that the Elkins Act repealed the Act of 1887 so far as any transactions in this case are concerned.

An exception to the charge of the Court in substance as follows: If the contract was made within the scope of the employment of the agent the corporation is bound thereby.

An exception to the charge of the Court as follows: After stating that while there may be overcharges and payments that are innocent and proper giving rise to reclamation, the question is what was the intent with which the check of $26,000 was paid—Was it a pure rebate or was it given for some legitimate and proper overcharge?

An exception to the charge of the Court that if the payment was not for a legitimate purpose the jury should convict the defendant.

An exception to the charge of the Court that under the Elkins Act the defendant is criminally responsible for the act of the agent if the agent acted in the scope of his employment and the Court reading to the jury a clause from the Elkins Act in that connec-

84 tion, and reading also the first clause of the Elkins Act, and to the charge of the Court that that is the law applicable to this case.

An exception to the refusal of the Court to charge the third request to charge and to the modification thereof.

An exception to the refusal of the Court to charge the fourth request and to the modification thereof.

An exception to the refusal of the Court to charge the fifth request and an exception to the modification thereof.

An exception to the refusal of the Court to charge the sixth request submitted by the defendant.

An exception to the refusal of the Court to charge the eighth request submitted by the defendant and an exception to the modification thereof, and exception specially to the charging the jury in substance in that connection that you can find the defendant guilty if the defendant received less than the published rate.

An exception to the refusal of the Court to charge the following part of the ninth request, to wit: "If the jury find as a fact that there

is no evidence one way or the other on that question, then the defendant must be acquitted."

An exception to the refusal of the Court to charge the tenth request.

An exception to the refusal of the Court to charge the eleventh request.

An exception to the refusal of the Court to charge the twelfth request.

An exception to the refusal of the Court to charge the thirteenth request.

An exception to the refusal of the Court to charge the fourteenth request.

An exception to the refusal of the Court to charge the fifteenth request.

An exception to the refusal of the Court to charge the sixteenth request and an exception to the modification thereof.

An exception to the refusal of the Court to charge the seventeenth request.

An exception to the refusal of the Court to charge the eighteenth request.

An exception to the refusal of the Court to charge the nineteenth request and to its modification thereof, and also to the language of the Court in that connection to the effect that it was for the jury to say whether or not there was any evidence that sugars were carried for other shippers on terms different from those mentioned in the indictment.

An exception to the refusal of the Court to charge the twentieth request and an exception to the modification thereof, and an exception to the Court's charging the jury in that connection that the question of ratification is a question for the jury.

An exception to the refusal of the Court to charge the twenty-first request.

An exception to the refusal of the Court to charge the twenty-fourth request.

An exception to the refusal to charge the twenty-sixth request.

An exception to the refusal to charge the twenty-seventh request.

An exception to the refusal to charge the twenty-ninth request, an exception to the modification thereof and an exception to the charge of the Court in that connection in substance that there is no legal presumption one way or the other on the proposition referred to in the request.

An exception to the refusal to charge the 30th request.

An exception to the refusal to charge the 32nd request.

An exception to the refusal of the Court to charge the 34th request.

An exception to the refusal to charge the 37th request.

An exception to the refusal to charge the 38th request.

An exception to the refusal to charge the 39th request and to the modification of the Court thereof, and to the charge of the Court in substance that that is a question for the jury.

An exception to the refusal of the Court to charge the 42nd request.

Exception to the refusal of the Court to charge the 45th request.

The jury retired, and subsequently returned to the court room.

The court thereupon charged the jury further as follows:

Gentlemen, I have received this paper from the Foreman of the Jury: "Does the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law."

To that I reply that it does provided the payment was made with a criminal intent. That criminal intent does not mean with
87 any wicked intent. The payment of rebates is not morally a crime. It was made a misdemeanor by statutes and if a corporation or officer of a corporation pays a rebate with an intent thereby to make the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent.

There are three provisions in this Act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

Under another provision of this Act if you find that this defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate, concession or discrimination upon the property transported in this case, "whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule," you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law. You will retire gentlemen.

Mr. LINDSAY: I would like to call Your Honor's attention to the fact that you instructed the jury they might find the defendant guilty if they "offered." There is no charge in this indictment of offering.

88 The COURT: I did not say offer, I think.

Mr. LINDSAY: Your Honor used the word offer.

The COURT: I withdraw that expression if I used it. I did not intend to use it.

Mr. LINDSAY: I also ask Your Honor in this connection to charge as this indictment is framed under the Elkins Law they cannot convict the defendant upon this indictment for anything which transpired before the going into effect of the Elkins Act.

The COURT: Undoubtedly the payment of the rebate must have taken place after the passage of that Act. The fact that the property was transported before the passage of the Act does not bar a conviction in this case.

Before the jury again retired and in their presence the defendant took the following exceptions to the further charge of the Court:

An exception to that portion of the instruction given to the jury in answer to the question presented by the Foreman in which the Court charged the jury in substance that the payment of the rebate after the passage of the Elkins Law on shipments made prior to its passage constituted an offense under the law.

An exception to that portion of the charge in which the Court said in substance that the guilty intent does not necessarily involve a wicked intent.

An exception to that portion of the further instruction in which the Court charged the jury in substance that the jury might find the defendant guilty upon either of the three following theories, namely: First if they find from the evidence that Guilford and Pomeroy were guilty of charging, demanding, collecting or receiving from the American Sugar Refining Company a less compen-
89 sation than that set forth in the scheduled rate. Second if they find that the defendant had been guilty of a wilful failure to strictly observe the tariff rate, or third, if they found that the corporation had offered, granted or given any rebate, concession or discrimination on property transported whereby any such property had been transported at less than the published tariff rate, provided in each case they found that the act was done with criminal intent.

An exception to the instruction given to the jury beyond the mere answering of the question propounded by it.

The jury again retired and later returned into court and rendered a verdict of guilty.

The defendant thereupon moved that the Court set aside the verdict and grant it a new trial upon each of the following grounds:

1. The Court erred in denying this defendant's motion to quash the indictment; to which denial this defendant duly excepted.

2. The Court erred in denying this defendant's motion that the United States Attorney be required to inform the defendant whether the indictment was intended to charge the giving of unlawful rebates in violation of the Elkins Act, or to charge a wilful failure strictly to observe the published tariff rates in violation of that Act; to which denial this defendant excepted.

3. The Court erred in refusing to inform the defendant as to its view of the nature of the crime charged in the indictment; to which refusal this defendant excepted.

4. The Court erred in denying this defendant's motion
90 made at the close of the evidence, that the jury be directed to acquit this defendant for the reasons set forth and stated at length in the said last mentioned motion; to which denial this defendant duly excepted.

5. The Court misdirected the jury in divers matters of law; to each of which misdirections this defendant duly excepted.

6. The Court erred in refusing to charge such of this defendant's requests to charge as it refused to charge in the form in which the same were requested, in its modifications of such of the said requests as were modified by the Court, and in charging the same as so modi-

fied, instead of in the form in which the same were presented; to each of which refusals, modifications and instructions, as so modified, this defendant duly excepted.

7. The verdict of the jury is contrary to law.

8. The verdict of the jury is contrary to the evidence in the case.

The Court denied the motion and the defendant excepted.

The defendant then moved in arrest of judgment, as appears by the record, and that motion having been denied, the court sentenced the defendant for the offense of which it has been convicted to pay a fine of Eighteen thousand dollars and directed that judgment be entered accordingly.

The Court thereupon granted the defendant a stay of execution in order to enable the defendant to prepare and serve this bill of executions, for which purpose the said October Term 1906 was duly extended.

91 EXHIBITS.

Exhibit 1 consists of that part of the tariff produced by the witness George T. Roberts in reference to the rate from New York City to Cleveland and from Yonkers to Cleveland, from which it appeared that the rate from Yonkers to Cleveland was the same as that from New York City to Cleveland, namely, twenty-one cents, that the New York rate as named in the tariff applied on St. John's Park Station, Pier 4 East River; Barclay Street Station; 33rd Street Station; 60th Street Station North River; from sugar refineries; from Palmer's Dock Foot of North Sixth Street Brooklyn, E. D.; from the foot of Bridge Street, Brooklyn and from forwarding stations of Brooklyn Wharf & Warehouse Company, Brooklyn; from Long Island City, N. Y., where coming from points beyond on Long Island Railroad; from Warren Street, Jersey City; also from Stations on the Hudson Division of the New York Central and Hudson River road and that New York did not include Yonkers.

EXHIBIT 2.

Red Line.

Initial Road.
N. Y. C. From 60 St. State of N. Y. July 24, 1902. Series: C. L. Way-Bill No. 225. Line pro. No. 313. Car Number 42918. Initial L. S. Route: Via Junction E. B., with L. S. Weigh this car at Pal. Docks. Consignor: A. S. R. Co. Consignee: Am. Sugar Ref. Co. Destination: Cleveland, O. Articles and classification: 100 b'r'l sugar. Weight: 34802; 1600—36402. Rate and Authority: 21. Freight: 76.44. Prepaid: 76.44. Paid to Cleveland. Merwin St. Warehouse. Pd. Cleveland. #1986 (428). Correct copy. D. L. Collin, Ag't.

EXHIBIT 3.

Office of
Lowell M. Palmer,
184 Front Street,

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Aug. 20 1902
Office of Ass't Traffic Manager.

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NEW YORK, *August* 19, 1902.

Dictated by T. P. R.
Personal.

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I enclose herewith our claim No. 30240, amounting to $2351.33, for overcharge in rate on the all-rail sugar forwarded to Cleveland, in accordance with our agreement.

Won't you be kind enough to have this matter handled promptly, and check for the claim, drawn to the order of Lowell M. Palmer, sent to me at your earliest convenience.

Yours very truly,

Enc.

LOWELL M. PALMER,
Per L.

EXHIBIT 4.

Office of
Lowell M. Palmer,
184 Front Street,

(Stamp)
N. Y. C. & H. R. R.
W. S. R. R.
Sep. 17 1902
Office of Ass't Traffic Manager.

NEW YORK, *Sept.* 16, 1902.

Personal.

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York.

93 DEAR SIR: I beg to enclose herewith our claim 30562, amounting to $11982.86, for overcharge on Cleveland sugar during the month of August. Kindly put same in the hands of the proper parties for prompt checking and payment, and thereby oblige,

Yours very truly,
(S'd)

LOWELL M. PALMER,
R.

Encl.

EXHIBIT 5.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Oct. 20, 1902,
Office of Ass't Traffic Manager.

Office of
Lowell M. Palmer,
184 Front Street.

NEW YORK, *Oct.* 14, 1902.

Personal:

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R, New York City.

DEAR SIR: I enclose herewith our claim No. 30975, amounting to $11,721.50, for overcharge on Cleveland sugar forwarded via Red Line during the month of September.

Won't you kindly arrange to have this claim put in line for prompt adjustment, and also see if settlement of the July and August claims cannot be hurried.

Yours very truly,

LOWELL M. PALMER,
R.

Enc.

EXHIBIT 6.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Nov. 19, 1902,
Office of Ass't Traffic Manager.

Office of
Lowell M. Palmer,
184 Front Street.

94

NEW YORK, *Nov.* 18, 1902.

Personal:

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I enclose herewith our claim No. 31530, amounting to $5881.13 for overcharge on shipments of sugar forwarded to Cleveland via the Red Line in October, which kindly put in line for adjustment.

Yours very truly,

LOWELL M. PALMER,
R.

Enc.

EXHIBIT 7.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Jan. 16, 1903,
Office of Ass't Manager.

Office of
Lowell M. Palmer,
184 Front Street.

NEW YORK, *Jan.* 13, 1903.

Personal.

r. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I beg to return herewith our claims for overcharge on e Cleveland all-rail sugar, amended to conform to the basis named Mr. Guilford's letter of Nov. 20, 1902. The claims, as they now nd, are as follows, and I should be very much obliged if you could e your way clear to have them vouchered and settled at an early te:

Our No.	30240	$2,254.18
Our No.	30562	$11,201.08
"	30975	10,707.81
"	31530	5,608.29
"	31874	9,672.94

Yours very truly,

LOWELL M. PALMER,
R.

Enc.

Exhibit 8 for identification was not offered in evidence.

EXHIBIT 9.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Mar. 19, 1903,
Office of Ass't Manager.

Office of
owell M. Palmer,
184 Front Street.

NEW YORK, *March* 18, 1903.

ersonal.

F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York ity.

EAR SIR: The claims rendered on last year's shipments of all-rail r to Cleveland by the Red Line amount to $31,936.82. Up to present writing, none of these claims has been paid, and if there ything you can do, looking towards their early adjustment, I

shall be much obliged. I would like to get them out of the way with as little further delay as possible.

Yours very truly,

LOWELL M. PALMER,
R.

Exhibit 10 for identification was not offered in evidence.

96 EXHIBIT 11.

Dated Office of Lowell M. Palmer, 184 Front St., New York City.

Personal.

Nov. 18TH, 1902.

Mr. Nathan Guilford, Traffic Manager, N. Y. C. & H. R. R. R., New York City.

DEAR SIR: Referring to the matter of the Cleveland all-rail sugar: In the first place let me call your attention to the memo made July 24th, 1902, in Mr. Pomeroy's office covering the arrangement:

"Sugar Shipments to Cleveland and Beyond.

1st. Shipments to be billed from New York at the regular tariff rate of 21 cents per 100 lbs.

2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements of 4 1/5 cents per 100 pounds.

3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under this arrangement to the American Sugar Refining Co., Merwin Street, Cleveland.

4th. The New York Central to make reclamation against L. M. Palmer for refund of one and one-fifth cents per 100 pounds, account of lighterage allowed him in regular billing. This amount to be handed by Mr. L. M. Palmer to the New York Central in cash.

5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central, for overcharge on such shipments of sugar to Cleveland as are covered by the first clause in this memorandum, on the basis of 6 cents per 100 pounds.

6th. This arrangement to apply to all sugar billed to Merwin Street warehouse, whether delivered locally in Cleveland or reconsigned beyond Cleveland.

The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return, for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds."

When the deal was consummated it was with the understanding that the all-rail sugar forwarded to Cleveland by the Red Line was to be used for delivering locally in Cleveland, or for reconsignment beyond, in precisely the same manner that the sugar forwarded by

canal had been used previously. Our arrangement with Mr.
97 Cost of the Big Four road, for the handling of the canal sugar was as follows: The Big Four road gave us the exclusive use of what is known as the Merwin Street warehouse in Cleveland, free of charge and all of the sugar stored in that warehouse, that was reconsigned beyond Cleveland, went forward by the Big Four to all points that they could reach; was delivered locally in Cleveland, or was sent forward from there by roads other than the Big Four to points which they could not handle, on proportional rates that were arranged with the other roads, based on the same figures we had in effect with the Big Four to adjacent points; the Big Four giving us precisely the same facilities and accommodations on sugar which they did not handle over their own roads from Cleveland, as on the sugar which they did carry; and, as stated above, it was of course understood that the same arrangement would apply on the all-rail shipments consigned to the Merwin Street warehouse. The first intimation that we had that there was anything wrong in our understanding of this arrangement was when Mr. Mitchell of the Michigan Central road called attention to the fact that some of this Merwin Street Sugar was being reconsigned over the Lake Shore road to Berdan & Co., Toledo. When this occurred, we discontinued filling any more of Berdan & Company's orders from the Cleveland stock, and since that time all of Berdan & Co.'s sugar has gone direct from New York all-rail, either by the Blue Line or the North Shore Despatch.

I think the above is a correct outline of what the arrangement was intended to cover. If it is your desire that we eliminate from the claims already rendered against the Red Line the sugar which was actually reconsigned from Cleveland to Berdan & Co., Toledo, please have Mr. Pomeroy return to us the three claims which have been presented to him, and we will have Berdan & Company's shipments cut out of them entirely.

Yours very truly,

(Signed) LOWELL M. PALMER.

EXHIBIT 12.

Memorandum Made July 24th, 1902.

Present: Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

Sugar Shipments to Cleveland and Beyond.

1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.

2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4 1/5 cents per 100 pounds.

3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.

4th. The New York Central to make reclamation against Mr. L.

M. Palmer for refund of 1 1/5 cents per 100 pounds, account
98 lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause in this memorandum on the basis of 6 cents per 100 pounds.

6th. This arrangement to apply to all sugar billed to Merwin Street warehouse whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds.

EXHIBIT 13.

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of the New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Company at a meeting held at Grand Central Depot in the City of New York, on September 28th, 1887:

Resolved: That Mr. Nathan Guilford be appointed General Traffic Manager of this Company to take effect October 1, 1887.

D. W. PARDEE,
Secretary.

EXHIBIT 14.

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of the New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Com-
99 pany at a meeting held at Grand Central Depot, in the City of New York, on May 11th, 1898:

Mr. Nathan Guilford, General Freight Traffic Manager, will have general supervision of all freight traffic, and Mr. George H. Daniels, General Passenger Agent, of all passenger traffic, reporting direct to the President.

D. W. PARDEE,
Secretary.

EXHIBIT 15.

The New York Central & Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of The New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Company at a meeting held at Grand Central Depot, in the City of New York, on February 1st, 1905:

The President explained the desirability of placing traffic matters in charge of a Vice-President; and, on his motion, Mr. Nathan Guilford was appointed Vice-President, in charge of such matters.

D. W. PARDEE,
Secretary.

EXHIBIT 16.

The New York Central & Hudson River Railroad Company.

NEW YORK, *February* 1, 1901.

Mr. F. L. Pomeroy has been appointed Assistant Traffic Manager of this Company, effective this date.

His office will be at Grand Central Station, New York City.

NATHAN GUILFORD,
Traffic Manager.

100 EXHIBIT 17.

New York Central and Hudson River Railroad.

Leased and Proprietary Lines.

General Notice.

NEW YORK, *June 30th,* 1904.

The following appointments and changes in organization of the Freight Department will take effect July 1st, 1904:

Fred L. Pomeroy, Freight Traffic Manager.

Francis La Bau, Assistant Freight Traffic Manager.

Herbert D. Carter, General Freight Agent, West Shore R. R.

William S. Kallman, 1st Ass't G. F. A., N. Y. C. & W. S. R. R's.

Ira H. Hubbel, 2nd Ass't G. F. A., N. Y. C. & W. S. R. R's.

H. W. Henry, Ass't General Coal Agent.

William A. Newman, Travelling Freight Agent, Hudson, Harlem & Putnam Division.

Offices at Grand Central Station, New York City.

The office of Chief of Tariff Bureau is abolished, and that Bureau will be in charge of the First Assistant General Freight Agent.

The office of Division Freight Agent of the Hudson, Harlem & Putnam Division is also abolished.

NATHAN GUILFORD,
Traffic Manager.

EXHIBIT 18.

New York Central & Hudson River Railroad Company. West Shore Railroad.

Nathan Guilford, Traffic Manager.

NEW YORK, *Nov.* 20, 1902.

L. M. Palmer, Esq., 184 Front Street, City.

DEAR SIR: Replying to your Personal letter of November
101 18th.

According to my memorandum regarding Cleveland sugar, which was made at the time of our conversation, July 18th, it applied only to shipments reforwarded over the Big Four road, and, according to my recollection, the matter of sugar delivered locally at Cleveland or forwarded from Cleveland over roads other than the Big Four was not discussed or mentioned.

On July 24th, in my absence you and Mr. Riley had a conference with Mr. Pomeroy, which developed that you regarded Cleveland city sugar as included in the arrangement; and it was then agreed with Mr. Pomeroy that it might be so included, the rate, however, to be 2 cents per 100 lbs., then on shipments forwarded via the Big Four, subject to my approval, which I hereby give, and settlement of the city shipments may be made on that basis.

With regard to shipments forwarded from Cleveland via other roads than the Big Four, as, for instance, shipments to points on the Lake Shore road, I think you will admit that no reference whatever was made to such shipments in our original arrangements, and we are not willing that it should be so included; and I have, therefore, to ask that you cut out such shipments from your statement, which should cover only shipments reforwarded from Cleveland over the Big Four road, and the city deliveries at 2 cents higher rate.

Trusting that this arrangement will be regarded by you as satisfactory under the circumstances, I am,

Yours truly,

(Signed) N. GUILFORD,
Traffic Manager.

EXHIBIT 19.

Bank of Buffalo. No. 295,647.

$26,141.81 BUFFALO, N. Y., *March* 26, 1903.

Chemical National Bank, New York City.

Pay to the order of Lowell M. Palmer, Twenty-six thousand, one hundred forty-one and 81/100 Dollars.

J. L. DANIELS, *Cashier.*

Endorsed: Pay to the order of the Market & Fulton National Bank, Lowell M. Palmer, Market and Fulton National Bank—Receiving Teller. Received payment March 28, 1903 through New York Clearing House.

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EXHIBIT 20.

Office of
Lowell M. Palmer
184 Front Street.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Mar. 24, 1903.

OFFICE OF ASS'T TRAFFIC MANAGER,
NEW YORK, *March* 23, 1903.

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I am exceedingly obliged for your personal favor of the 21st inst., and am very glad to note that we may expect payment of the Cleveland sugar claims by the 15th of April.

Our Wall street people keep after me about this matter, and I shall appreciate anything you can do personally looking towards the adjustment of the matter by the date mentioned.

Yours very truly, LOWELL M. PALMER,
R.

EXHIBIT 22.

MARCH 21*st*, 1903.

Mr. L. M. Palmer, #184 Front St., New York, N. Y.

DEAR SIR: Your personal note of the 16th in regard to claims on sugar to Cleveland:

These claims are in the hands of Mr. Wilson who advises me that most of them will go through this month's account and that he ought to be able to pay them by the 15th of April and possibly be-
103 fore. This will be governed by the state of his finances which is controlled by the roads in the lines.

He will do everything he can to hurry payment and I will watch the matter myself.

Yours truly, F. L. POMEROY,
Assistant Traffic Manager.

EXHIBIT 21.

(P.) Nov. 24TH, 1902.

Personal.

Mr. L. M. Palmer, #184 Front St., New York City.

DEAR SIR: I return herewith your claims as follows covering shipments of sugar to Cleveland, O.:

Your claim 30240 covering shipments in July amounting to $2351.33.

Your claim 30562 covering shipments in August amounting to $11982.86.

Your Claim 30975 covering shipments in September amounting to $11721.50.

Your claim 31530 amounting to $5881.13 covering shipments in October.

I note that all of these claims simply show shipments consigned to Cleveland, and I would therefore be glad if you would have these claims corrected so as to be in accordance with your letter to Mr. Guilford of November 18th and his reply of the 20th. Will you kindly do this and return papers to me, when I will make
104 necessary arrangements for settlement of claims.

Yours truly, F. L. POMEROY,
Asst. Traffic Manager.

The foregoing case contains all the evidence given upon the trial.

And for as much as the matters hereinabove set forth do not fully appear of record, and to the end that the same may be and become of record, and in furtherance of justice and that right may be done, the defendant presents and tenders this his bill of exceptions herein, and prays that the same may be settled, allowed, signed and certified by the Judge who presided at the trial of this cause, as provided by law; and it is done accordingly at the said October Term this 25th day of March, 1907.

GEO. C. HOLT,
District Judge of the United States for the Southern District of New York.

No objection is made to the form of the foregoing proposed bill of exceptions, and notice of the settlement thereof is hereby waived.

Dated, March 25th, 1907.

HENRY L. STIMSON,
United States Attorney.

105 (Endorsed:) U. S. Circuit Sourt, Southern District of New York.—United States *vs.* The New York Central & Hudson River Railroad Company.—Bill of Exceptions.—Albert H. Harris, Attorney for Defendant, 417 Grand Central Station, Borough of Manhattan, New York City.—U. S. Circuit Court, Southern District New York, Filed Mar. 25, 1907, John A. Shields, Clerk.

106 **Circuit Court of the United States, Southern District of New York.**

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Indictment for Unlawfully Granting Rebates in Violation of the Act to Regulate Commerce. 1 Supp., 525, 687, & 32 Stat. 23, 26. Filed March 24, 1906.

Motion in Arrest of Judgment.

And now after verdict and before sentence comes the defendant and moves the court to arrest judgment herein, and not pronounce the same because of manifest errors in the record appearing, to wit:

(1) The Act of February 19, 1903, known as the Elkins Law, on which the indictment is based, was enacted in excess of the power to regulate commerce with foreign nations and among the several states and with Indian tribes conferred upon the Congress by section 8 of Article I of the Constitution of the United States, and is unconstitutional and void in that it undertakes to impose and prescribe unreasonable, unequal and unjust regulations of interstate commerce, that is to say, it subjects carriers engaged in interstate commerce by means of the transportation of property from places in one state to places in another state by railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations,
107 restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of the transportation of the same kind of property between the same places, by means of water lines or routes.

(2) The said statute is an unreasonable, unjust and unequal regulation of interstate commerce, and is unconstitutional and void in so far as it undertakes to punish this defendant for acts done by its agents while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with the defendant corporation by means of an all-water line or route, would be entirely innocent.

(3) The said statute is unconstitutional and void in that it seeks to deprive this defendant corporation of its property without due process of law in violation of Article V of the amendments to the Constitution of the United States, by subjecting it to the payment of a pecuniary fine, for acts committed by its agents within the scope of their employment in which this defendant did not in any manner participate, thus imputing to the said corporation, and punishing it criminally for acts which it did not in fact commit.

(4) The provisions of section 1 of the said statute, that
108 in construing and enforcing its provisions, the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier, upon which provision the validity of this indictment wholly rests, so far as it relates to the defendant corporation, infringes the rights, privileges and immunities of this defendant corporation under Article V of the Amendments to the Constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, and thus depriving it of property without due process of law; and the said provision is therefore unconstitutional and void.

(5) The Congress is without power, under the Constitution of the United States, to impute to this corporation the commission of a criminal offense and subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

(6) The matters mentioned in the indictment, in the manner and form as the same are therein stated and set forth, are not sufficient in law, and the defendant is not bound by the law of the land to answer the same.

(7) The acts described and set forth in the first count do not constitute a crime under the laws of the United States.

(8) The acts described and set forth in the second count do not constitute a crime under the laws of the United States.

109 (9) The first count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(10) The second count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(11) The first count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(12) The second count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(13) The first count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(14) The second count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(15) The Elkins Law did not and was not intended by the Congress to apply to the offering, granting or giving of rebates, concessions or discriminations in respect of the transportation of property in interstate or foreign commerce transported prior to the time when the said amendatory statute went into effect; but applied, and was intended to apply, only to the offering, granting or giving of such
110 rebates, concessions or discriminations in respect of the transportation of property transported in such commerce after the said amendatory statute went into effect; and inas-

much as it does not appear from anything alleged in the first count that the sum therein stated to have been paid by the defendant on April 2, 1903, for and on account and by way of a rebate and drawback was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the first count do not constitute any violation of the Elkins Law.

(16) For the same reason set forth in the last preceding paragraph, and inasmuch as it does not appear that the payment therein stated to have been paid by the defendant "as and for an unlawful rebate, concession and discrimination," was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the second count do not constitute any violation of the Elkins Law.

(17) The failure to allege the time when the shipments of sugar mentioned in the first count were made, or to state whether the same were made before or after the going into effect of the Elkins Law, renders that count invalid since without such specification the defendant is not informed and the court cannot know the state of facts upon which the court will be called to apply the law of the case.

(18) For the same reason the failure to allege the time
111 when the shipment of sugar mentioned in the second count were made, renders that count invalid.

(19) The payment by the defendant on April 2, 1903, of the sum in the first count alleged to have been paid for and on account and by way of a rebate and drawback did not constitute a violation of any statute or law of the United States at that time in force.

(20) The payment by the defendant on April 2, 1903, of the sum in the second count alleged to have been paid as and for an unlawful rebate, concession and discrimination, did not constitute a violation of any statute or law of the United States at that time in force.

(21) The facts set forth in the first count do not constitute a crime, since it is not alleged that the payment therein alleged to have been made by the defendant was made in respect of the transportation by the defendant of the sugars therein mentioned, or of any property, in interstate commerce.

(22) The facts set forth in the second count do not constitute a crime, since it is not alleged that the sum therein alleged to have been offered, granted and given by the defendant as and for an unlawful rebate, concession or discrimination, was offered, granted or given in respect of the transportation of property in interstate commerce, or that it was given in respect of any particular transaction or matter.

(23) The acts alleged in the first count do not constitute
112 any violation of the Elkins Law by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(24) The acts alleged in the second count do not constitute any violation of the Elkins Law by any unlawful failure on the part of

the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(25) The absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set forth in the first count renders that count invalid.

(26) The absence of any allegation that advantage was given or discrimination practiced by reason of the matters set forth in the second count renders that count invalid.

(27) The acts alleged in the first count to have been done after the going into effect of the Elkins Law, constitute no violation of the provisions of that statute.

(28) The acts alleged in the second count to have been done after the going into effect of the Elkins Law constitute no violation of the provisions of that statute.

(29) The acts alleged in the first count do not constitute any violation of the Elkins Law in the offering, granting or
113 giving of a rebate, concession or discrimination within the meaning of that statute.

(30) The acts alleged in the second count do not constitute any violation of the Elkins Law in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

(31) This defendant is incapable of committing any crime by reason of the matters set forth in the first count.

(32) This defendant is incapable of committing any crime by reason of the matters set forth in the second count.

(33) The acts described and set forth in the first count do not constitute a crime in that it is not alleged therein that the sum therein charged to have been paid by way and for and on account of rebate and drawback was paid unlawfully, or with criminal intent, or with the intent thereby to offer, grant or give any rebate, concession or discrimination, or that thereby any rebate, concession or discrimination was offered, granted or given.

(34) The acts described and set forth in the second count do not constitute a crime in that it is not alleged therein that the sum therein charged to have been paid as and for an unlawful rebate, concession and discrimination was paid with criminal intent.

(35) Two distinct and separate offenses are charged in the first count.

(36) Two distinct and separate offenses are charged in
114 the second count.

37. If the second count adequately alleges the offense of granting or giving a rebate in violation of the Elkins Act, and also adequately alleges the offense of wilfully failing strictly to observe the published tariff rates and charges in violation of the same Act, it is bad for duplicity, and no valid judgment can be rendered thereon.

38. If the second count adequately alleges the offense of granting or giving a rebate in violation of the Elkins Act, and also adequately alleges the offense of wilfully failing strictly to observe the pub-

lished tariff rates and charges in violation of the same Act, that count is bad for duplicity, and no valid judgment can be rendered thereon.

39. More than three years have elapsed since the commission of any acts alleged in the indictment for which this defendant can be lawfully subjected to a criminal prosecution under any statute or law of the United States; and during all of said time the defendant has been a citizen, inhabitant and actual resident of this District, and has been at all times within the jurisdiction of the court.

And because no judgment can be lawfully rendered against the defendant on the said record.

Dated, New York, November 22, 1906.

ALBERT H. HARRIS,
Attorney for the Defendant.

115 (Endorsed:) U. S. Circuit Court, Southern District of New York.—United States, Plaintiff, against The New York Central & Hudson River Railroad Company, Defendant.—Motion in Arrest of Judgment.—Albert H. Harris, Attorney for Defendant, 417 Grand Central Station, Borough of Manhattan, New York City.—Due and timely service of a copy of the within Motion is hereby admitted. Dated November 22, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District New York, Filed Nov. 22, 1906, John A. Shields, Clerk.

116 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Assignment of Errors.

Now comes the above named defendant, the New York Central and Hudson River Railroad Company, by Albert H. Harris, its attorney, and in connection with its petition for a writ of error herein, makes and files the following assignment of errors:

The Court erred:

1. In holding that the Act of the Congress of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" on which the indictment herein was based was not unconstitutional and void, and was not enacted in excess of the power conferred upon the Congress by the commerce clause of the constitution of the United States.

2. In holding that the said Act by subjecting carriers engaged in interstate commerce by means of railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations,

restrictions, pains, penalties and punishments which were
117 not imposed upon carriers engaged in such interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of all-water lines of route, did not undertake to impose and prescribe unequal and unjust regulations of interstate commerce, and was not for that reason unconstitutional and void.

3. In holding that the said Act was not an unreasonable, unjust and unequal regulation of interstate commerce, and was not unconstitutional and void in so far as it undertook to punish this defendant for acts done by its agents, while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with this defendant by means of an all-water line or route, would not be the subject of prosecution under the Act.

4. In holding that the said Act, by subjecting this defendant to the payment of a pecuniary fine for acts committed by its agents within the scope of their employment, in which this defendant did not in any manner participate, thus imputing to this defendant and making it punishable criminally for acts which it did not in fact commit, does not seek to deprive this defendant of its property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, and was not for that reason unconstitutional and void.

118 5. In holding that section 1 of the said Act which declares that in construing and enforcing its provisions the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier does not infringe the rights, privileges and immunities of this defendant under the said Fifth Amendment, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, thus depriving it of property without due process of law, and that the said section was not for that reason unconstitutional and void.

6. In holding that the Congress has power under the Constitution of the United States to impute to this defendant the commission of a criminal offense and to subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

7. In overruling the demurrer interposed by the defendant to the indictment herein.

8. In denying the defendant's motion to quash the indictment.

9. In holding that the indictment, and the matters therein contained, in manner and form as the same are therein stated and set forth, are sufficient in law, and that the defendant was bound by the law of the land to answer the same.

10. In holding that the acts described and set forth in the
119 first count constitute a crime under the laws of the United States.

11. In holding that the acts described and set forth in the second count constitute a crime under the laws of the United States.

12. In holding that the first count apprises the defendant with reasonable certainty of the nature of the accusation thereby intended to be made against it.

13. In holding that the second count apprises the defendant with reasonable certainty of the nature of the accusation thereby intended to be made against it.

14. In holding that the first count is not so ambiguous and uncertain as to make it doubtful what is the exact offense intended thereby to be charged.

15. In holding that the second count is not so ambiguous and uncertain as to make it doubtful what is the exact offense intended thereby to be charged.

16. In holding that the first count charges the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

17. In holding that the second count charges the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

18. In holding that the Act of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" applied to the offering, granting or giving of rebates, concessions or discriminations in respect of the transportation of property in interstate or foreign commerce transported
120 prior to the time when the said Act went into effect.

19. In holding that the failure to allege the time when the shipments of sugar mentioned in the first count were made, or to state whether the same were made before or after the going into effect of the said Act of February 19, 1903, did not render that count invalid.

20. In holding that the failure to allege the time when the shipments of sugar mentioned in the second count were made, or to state whether the same were made before or after the going into effect of the said Act, did not render that count invalid.

21. In holding that the payment by the defendant on April 2, 1903, of the sum in the first count alleged to have been paid for and on account and by way of a rebate or draw-back constituted a violation of the said Act.

22. In holding that the payment by the defendant on April 2, 1903, of the sum in the second count alleged to have been paid as and for an unlawful rebate, concession and discrimination, constituted a violation of the said Act.

23. In holding that the facts set forth in the first count constitute a crime, notwithstanding it is not alleged therein that the payment therein charged to have been made by the defendant was made in respect of the transportation of property in interstate commerce.

24. In holding that the facts set forth in the second count constitute a crime, notwithstanding it is not alleged therein that the
121 sum, therein charged to have been offered, granted and given by the defendant as and for an unlawful rebate, concession

or discrimination, was offered, granted or given in respect of the transportation of property in interstate commerce.

25. In holding that the first count alleged a wilful failure on the part of the defendant strictly to observe its published tariff rates within the meaning of the said Act.

26. In holding that the second count alleged a wilful failure on the part of the defendant strictly to observe its published tariff rates within the meaning of the said Act.

27. In holding that the absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set forth in the first count did not render that count invalid.

28. In holding that the absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set forth in the second count did not render that count invalid.

29. In holding that the acts in the first count alleged to have been done after the going into effect of the said Act constituted a violation of the provisions of that statute.

30. In holding that the acts in the second count alleged to have been done after the going into effect of the said Act consti-
122 tuted a violation of the provisions of that statute.

31. In holding that the acts alleged in the first count constitute a violation of the said Act in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

32. In holding that the acts alleged in the second count constitute a violation of the said Act in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

33. In holding that this defendant is capable of committing any crime by reason of the matters set forth in the first count.

34. In holding that this defendant is capable of committing any crime by reason of the matters set forth in the second count.

35. In holding that the prosecution was not barred, notwithstanding that at the time of the finding of the indictment more than three years had elapsed since the commission of any acts therein alleged for which this defendant could be subjected to any criminal prosecution, during all of which time the defendant had been a citizen, inhabitant and actual resident of the Southern District of New York and had been at all times within the jurisdiction of this court.

36. In denying the defendant's motion made after the opening of the case for the Government and before the introduction of
123 any evidence, that the United States attorney be required to inform the defendant whether it was charged in the indictment with the giving of rebates under the Act of February 19, 1903, or with having wilfully failed strictly to observe the tariff rate under that Act, or whether the indictment charged the defendant with a violation of the Act of February 19, 1903, or of the Act to regulate commerce, which the Act of February 19, 1903, amended and to a certain extent superseded.

37. In denying the defendant's motion (made upon the denial of the said last mentioned motion) that the court inform the defend-

ant what its view was as to the nature of the crime charged in the indictment.

38. In overruling the defendant's objection to the following question propounded to the witness George T. Roberts: Q. "What was the tariff from Yonkers to Cleveland over the New York Central and Hudson River Railroad Company and the Lake Shore and Michigan Southern on sugar in carload lots, in barrels or bags, during the year 1902?" and in permitting the witness to testify, over the defendant's objection, in answer to the said question, in substance that the tariff from Yonkers to Cleveland over the said roads, on sugar in car-load lots, in barrels or bags, during the year 1902 was twenty-one cents for each one hundred pounds.

39. In denying the defendant's motion that the jury be directed to acquit the defendant, in that

(*a*) it appeared by the evidence that the transportation of all of the goods mentioned in the indictment or as to which any evidence had been adduced was begun and completed before the pas-
124 sage of the Act of February 19, 1903;

(*b*) that there was no evidence in the case showing or tending to show that at any time after the going into effect of the said Act there was any wilful failure on the part of the defendant strictly to observe the published tariff rate in respect to the transportation of any property which was transpored after the going into effect of the said Act;

(*c*) that there was no evidence in the case showing or tending to show that at any time after the passage of the said Act the defendant was guilty of any violation thereof in respect to the payment or giving or offering of any rebate made punishable under its provisions;

(*d*) that there was no evidence in the case showing or tending to show the commission by the defendant within the Southern District of New York or within the jurisdiction of this court of any violation of the Act;

(*e*) that the indictment charged no violation by the defendant of the Act or of any other statute of the United States.

40. In charging the jury as follows:

"The original Interstate Commerce Act provided that every common carrier carrying on commerce between the states, either alone or by a joint traffic arrangement with connecting roads, should print and keep open for public inspection, schedules showing the rates of fares and charges for transportation of passengers and property which any such common carrier has established and which are in force at the time. There are various provisions in detail contained in the Act with reference to these schedules. They are to be filed in the office of the Commission of Interstate Commerce and posted in the stations of the roads, and deviations from these
125 scheduled rates are declared to be illegal. When any such common carrier shall have established and published these rates, fares and charges in compliance with the provisions of this section the Act provides that 'it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or

persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time.'"

41. Again in charging the jury as follows:

"Of course in the case of the defendant in this case, if a passenger agent or a person having nothing to do with the traffic department of the business should make a contract for rebates on the carriage of freight, the corporation would not be bound by it; but if the contract is made by an officer or agent of the company acting within the scope of his employment, the corporation is bound."

42. Again in charging the jury as follows:

"Of course there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause. That is the simple question in this case for you to determine and that question I leave for you to pass upon upon the consideration of all the evidence in the case."

43. In refusing to charge the jury as follows:

"That upon all the evidence it is the duty of the jury to render a verdict of not guilty."

44. In refusing to charge the jury as follows:

"That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant
126 was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors or any officer beyond the agent who gave the rebate, then the defendant should be acquitted."

45. In refusing to charge the jury as follows:

"That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation."

46. In refusing to charge the jury as follows:

"That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except said agent, then the defendant must be acquitted."

47. In refusing to charge the jury as follows:

"That the burden of proof is not upon the defendant to show affirmatively that no advantage was given in favor of or a dis-

crimination practiced against any shipper or consignee other than those named in the indictment, but the burden of proof is upon the Government to show that fact, if it be true."

48. In refusing to charge the jury as follows:

"That the jury must not speculate or guess on the question whether any advantage was given to or discrimination practiced against any shipper or consignee other than those named in the indictment, and if the jury find as a fact that there is no evidence one way or the other on that question, then the defendant must be acquitted."

49. In refusing to charge the jury as follows:

"That the Government having failed to prove that any advantage was given to anyone mentioned in the indictment, or that discrimination was practiced in favor of or against any other shipper or consignee by reason of the giving of the alleged rebate, the defendant must be acquitted."

127 50. In refusing to charge the jury as follows:

"That before the jury can find this defendant guity of giving an unlawful rebate, they must find as a fact from the evidence and find beyond a reasonable doubt, that in the giving of the alleged rebate the defendant did thereby give some advantage to or practiced some discrimination in favor of or against some other shipper or consignee than the one mentioned in this indictment."

51. In refusing to charge the jury as follows:

"That the element of advantage or discrimination is an essential element of the crime of giving a rebate and as the indictment omits to allege this element it fails to charge a crime and the defendant must be acquitted."

52. In refusing to charge the jury as follows:

"That even if the jury find a criminal intent in an agent or agents of the defendant, the jury cannot impute that intent to the defendant."

53. In refusing to charge the jury as follows:

"That the jury cannot make a finding of criminal intent against the defendant and base that finding solely on a finding of criminal intent in an agent or agents of the defendant."

54. In refusing to charge the jury as follows:

"That the defendant can in no event be convicted of a criminal intent to commit the crime of giving a rebate."

55. In refusing to charge the jury as follows:

"That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity or by direction of those controlling its corporate action it gave or authorized the giving of the rebate charged in the indictment."

56. In refusing to charge the jury as follows:

"That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted."

128 57. In refusing to charge the jury as follows:

"That the defendant cannot be found guilty unless the evidence shows that sugar was carried for other shippers over the route named in the indictment on terms different from those given to the shippers named in the indictment."

58. In refusing to charge the jury as follows:

"That there is no evidence that sugars were carried for other shippers over the route between New York and Cleveland named in the indictment on terms different from those on which the sugars mentioned in the indictment were carried."

59. In refusing to charge the jury as follows:

"That the jury cannot find the defendant guilty upon a finding that the defendant after the fact, ratified or approved of the giving of alleged rebate."

60. In refusing to charge the jury as follows:

"That even if the jury find as a fact that an agent or agents of the defendant gave a rebate as alleged in the indictment, and that thereafter such rebate was paid by or through other agents of the defendant corporation in Buffalo, still these facts are not of themselves sufficient to warrant a verdict of guilty against the defendant."

61. In refusing to charge the jury as follows:

"That there is no evidence that those who controlled the corporate action of the defendant authorized or knew of the giving of the rebate alleged in the indictment."

62. In refusing to charge the jury as follows:

"The provisions of the Elkin's Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

63. In refusing to charge the jury as follows:

"That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy and that
129 as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted."

64. In refusing to charge the jury as follows:

"That in order to find that an agent or agents of the defendant was or were acting within the scope of his or their employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent or agents had authority to establish lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment."

65. In refusing to charge the jury as follows:

"The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment."

66. In refusing to charge the jury as follows:

"The presumption is that the defendant gave no direction or authority to any of its agents to commit an offense against the United States."

67. In refusing to charge the jury as follows:

"The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States."

68. In refusing to charge the jury as follows:

"That in order to find the defendant guilty, the jury must find that the evidence shows beyond a reasonable doubt that the defendant itself was guilty of a criminal intent separate and distinct from any criminal intent of any agent or agents of defendant whom the jury may find gave the rebate charged in the indictment."

69. In refusing to charge the jury as follows:

"That even if the jury find that some agent or agents of the defendant gave the rebate charged in the indictment and acted with criminal intent in so doing, yet the jury must not impute such criminal intent to the corporation merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant."

130 70. In refusing to charge the jury as follows:

"Even if the defendant can be guilty of a criminal intent, the jury cannot base a finding of such criminal intent solely on a finding of criminal intent on the part of Fred L. Pomeroy."

71. In refusing to charge the jury as follows:

"The defendant cannot be convicted of a wilful failure strictly to observe the published tariff rates by reason of anything done or omitted by it, or its agents, after the transportation of property was completed."

72. In refusing to charge the jury as follows:

"The alleged payment on April 2nd, 1903, did not constitute a failure on its part strictly to observe its published rate."

73. In refusing to charge the jury as follows:

"That if the jury are unable to determine whether either Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent, then the jury must find a verdict of not guilty."

74. In refusing to charge the jury as follows:

"That if the jury find as a fact that the language of the Elkins Act is confusing, so far as it applies to the matters charged in the indictment, they may take that fact into consideration in determining the guilt or innocence of the defendant."

75. In further charging the jury in response to its question: "Does the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law?" as follows:

"To that I reply that it does, provided the payment was made with criminal intent."

76. In further charging the jury in response to the said question:

"That criminal intent does not mean with any wicked intent. The payment of rebates is not morally a crime. It was made
131 a misdemeanor by statutes, and if a corporation or officer of a corporation pays a rebate with an intent thereby to make

the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent."

77. In further charging the jury in response to said question as follows:

"There are three provisions in this Act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

Under another provision of this Act if you find that this defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate, concession or discrimination upon the property transported in this case, 'whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule,' you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law."

78. In denying the defendant's motion to set aside the verdict and for a new trial.

79. In denying the defendant's motion in arrest of judgment.

80. In entering judgment upon the verdict of the jury.

Wherefore the defendant prays that the judgment herein be reversed, annulled and held for naught, and that the defend-
132 ant be wholly discharged and dismissed from the premises in the indictment specified.

Dated, New York, March 30th, 1907.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By ALBERT H. HARRIS, *Attorney.*

Read the 30th day of March, 1907.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—The United States of America, *vs.* The New York Central and Hudson River Railroad Company.—Assignment of Errors.—Albert H. Harris, Attorney for Defendant.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

133 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error,
against
THE UNITED STATES OF AMERICA, Defendant-in-Error.

Supersedeas Bond.

Know all men by these presents, that we, The New York Central and Hudson River Railroad Company, a corporation organized and existing under the laws of the State of New York, as principal, and National Surety Company, a New York corporation, as Surety, are held and firmly bound unto The United States of America in the sum of Eighteen Thousand Dollars to be paid to the said United States, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of March, in the year of our Lord, One Thousand Nine Hundred and Seven.

Whereas, on the 22nd day of November, 1906, in a cause pending in this court between the United States of America and the said New York Central and Hudson River Railroad Company a judgment and sentence were rendered against the said The New York Central and Hudson River Railroad Company, and

Whereas, the said The New York Central and Hudson River Railroad Company has prayed and been al-owed a writ of error from the Supreme Court of the United States to this court to re-
134 verse the said judgment and sentence;

Now, the condition of this obligation is such that if the said The New York Central and Hudson River Railroad Company shall prosecute the said writ of error to effect an- answer all damages and costs if it fail to make its plea good, and shall appear in the said Supreme Court on the 27 day of April 1907, and from day to day thereafter until the said cause shall be finally disposed of, and shall abide by and obey the judgment and order made by the said Supreme Court in said cause, and shall pay the said judgment against it, if the same shall be affirmed and if it shall appear for trial in this court on such day as may be appointed for a retrial and abide by and obey all orders of this court, provided the said judgment and sentence against it shall be reversed by the said Supreme Court, then this obligation shall be void; otherwise to remain in full force and virtue.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
[SEAL.] By W. A. NEWMAN, *President.*
THE NATIONAL SURETY COMPANY,
[SEAL.] By WM. A. THOMPSON, *Resident Vice-President.*

Attest:
HARRY E. EMMETT,
Resident Assistant Secretary.

Sealed and delivered, and taken and acknowledged, this 29th day of March, 1907, before me,

[SEAL.] E. MORTIMER BOYLE,
Notary Public, New York County.

Approved as to form and sufficiency of surety this 30
135 day of March, 1907.

HENRY L. STIMSON,
United States Attorney.

136 **Financial Exhibit of the National Surety Company of New York as of December 31st, 1906.**

Wm. B. Joyce, President. **Samuel H. Shriver, Secretary.**

Assets.

Bonds:

275,500	United States Government Bonds	$294,115.00	
940,000	New York City Bonds	930,600.00	
10,000	Penna. Railroad Bonds	9,600.00	

Guaranteed Railroad Stocks:

100 Shs.	N. Y. Lack. & W.	(5% Guar. by D. L. & W.)	12,925.00
100 "	Nash. & Decatur	(7½% " " L. & N.)	19,375.00
200 "	Morris & Essex	(7% " " D. L. & W.)	37,100.00
100 "	Pitts. Ft. W. & Chic.	(7% " " Penn. R. R.)	17,775.00
100 "	Cleve. &. Pitts.	(7% " " " ")	17,758.33
100 "	Atl. & Char. Air Line	(7% " " So. Ry.)	18,058.33
100 "	Det. Hillside & S. W.	(4% " " L.S.&Mich. So.)	10,400.00
100 "	Rome, Watert'n & Og.	(5% " " N. Y. Cent.)	12,862.50
100 "	Ill. Cent. Leased Lines	(4% " " Ill. Cent.)	10,400.00
400 "	K. C. Ft. S. & Memph	(4% " " St. L. & San Fr.)	32,000.00

Railroad Stocks:

200 Shares	Union Pac. Preferred	18,500.00
400 Shares	Lehigh Valley.	31,000.00
		1,472,469.16
Real Estate (Unencumbered)		116,426.77
Mortgage Loans (First Liens)		17,465.85
Advanced on Contracts (Secured)		9,553.65
Accounts due from R. R.'s for inspections, not over three months overdue		5,727.61
Outstanding Premiums, not over three months overdue		179,719.15
Accrued Interest on Investments		8,196.15
Cash in Banks and Offices		294,553.67
		$2,104,112.01

Liabilities.

Capital Stock	$500,000.00
Net Surplus	620,565.61
Quarterly Dividend payable Jan'y 2, 1907	10,000.00
Reserve for Claims in process of adjustment, less reinsurance	115,978.01
Legal Premium Reserve	700,097.01
Contingent Reserve	100,000.00
Commission on Unpaid Premiums and Other Liabilities	57,471.38
	$2,104,112.01

STATE OF NEW YORK, *City and County of New York, ss:*

Gilbert Congdon of New York, being duly sworn, deposes and says that he is Assistant Secretary of the National Surety Company, of New York, and that the above and foregoing is a full, true and correct statement of the financial condition of said company on the Thirty-first day of December, A. D., 1906, as the same remains upon file in the office of the Attorney-General of the United States.

GILBERT CONGDON.

Subscribed in my presence and sworn to before me this 28th day of March, A. D., 1907.

[SEAL.] MARGARETTA CROOKE,
Notary Public, No. 35, for Kings County.

Certificate filed in New York, Queens, Richmond and Westchester Counties.

43 WALL STREET,
NEW YORK, *January 23rd,* 1907.

We have examined the books of the National Surety Company, of New York, as of December 31st, 1906, and certify that the foregoing Balance Sheet agrees therewith and, in our opinion, correctly sets forth the condition of the Company's affairs as of that date. We received verification of the Cash in banks and offices; and all Securities covering the Investments and other Assets of the Company were examined by us and found in order.

GUNN, RICHARDS & CO.,
Public Accountants.

137 (Endorsed:) Circuit Court of the U. S., Southern District of New York.—The New York Central and Hudson River R. R. Co. Plaintiff in Error, *vs.* The United States of America, Defendant in Error.—Supersedeas Bond.—Albert H. Harris, Attorney for Plaintiff-in-Error, 417 Grand Central Station, Manhattan, New York City, N. Y.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Defendant in Error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

138 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit,

To Henry L. Stimson, Esquire, United States Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the City of

Washington, in the District of Columbia, on the 27 day of April 1907, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the New York Central and Hudson River Railroad Company is plaintiff and the United States of America is defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 30 day of March, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

139 [Endorsed:] E. & A. C. 2571. United States Supreme Court. The New York Central and Hudson River R. R. Co., Plaintiff-in-error, *vs.* The United States of America, Defendant-in-error. Citation. U. S. Circuit Court. Filed Apr. 1 1907 Southern District, New York. John A. Shields, Clerk. Albert H. Harris, Attorney for plaintiff-in-error, 417 Grand Central Station, Manhattan, New York City, N. Y. A copy of the within paper has been this day received at this office. Apr. 1 1907 Henry L. Stimson U. S. Attorney. 10 M E

140 [Endorsed:] U. S. Supreme Court New York Central and Hudson River R. R. Co. Pl'ff in Error, *vs.* The United States of America Def't in Error.

Endorsed on cover: File No. 20,686. S. New York C. C. U. S. Term No. 294. The New York Central & Hudson River Railroad Company, plaintiff in error, *vs.* The United States. Filed May 1st, 1907. File No. 20,686.

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Supreme Court of the United States,

OCTOBER TERM, 1908.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error, vs. THE UNITED STATES.	No. 69.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the Circuit Court of the United States for the Southern District of New York, rendered November 22, 1906, sentencing the plaintiff in error, a New York corporation, to pay a fine of $18,000 on conviction by the verdict of a jury of an alleged violation of Section 1 of the so-called Elkins Act (Record, pp. 2, 19-20, 49-50).

The indictment, which was one of the four filed May 4, 1906 (see our brief in No. 57, argued herewith, p. 4, *note*), contains two counts (Record, pp. 3-8). It was based upon the payment to the American Sugar Refining Company on April 2, 1903—two months after the passage of the Elkins Act—of an alleged

rebate of $26,141.81 in respect of the transportation prior to the passage of that Act, of various consignments of sugar from New York to Cleveland, Ohio. It is apparent from the form of the language used in the charging part, and in the concluding paragraph of each of the counts, that the pleader was in doubt as to whether or not Section 1 of the Elkins Act operated to repeal the penal provisions of the earlier statute dealing with the same general subject matter, and therefore undertook to employ language which would bring the case within either Act.

The first count sets forth that at the times therein mentioned the plaintiff in error was engaged in the transportation of property, from the City of New York, by way of the Southern District of New York, to the City of Cleveland, Ohio, and beyond, and had filed and published a tariff or schedule of charges, &c., whereby the rate from New York to Cleveland upon sugars was twenty-one cents for each hundred pounds:

> "which . . . was the rate charged, demanded, collected and received by the said New York Central and Hudson River Railroad Company from other persons than 'The American Sugar Refining Company'" (a New Jersey corporation) "for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned" (p. 4).

It then alleges that on November 20, 1902, the officers and agents of the Sugar Company induced the plaintiff in error to enter into an unlawful agreement and arrangement whereby it was agreed that in the event of the Sugar Company shipping a portion of its products from New York to Detroit over the lines and routes aforesaid, and paying the plaintiff in error the full tariff rate of twenty-one cents, the plaintiff in error would allow the Sugar

Company a rebate to be refunded therefrom, of six cents for each hundred pounds of sugar shipped to Cleveland for reconsignment to points beyond that city, and of four cents for each hundred pounds shipped to Cleveland to go no further; that under the agreement the Sugar Company made divers and various consignments over the plaintiff in error's lines; that the lawful tariff rate was duly paid by the Sugar Company according to the agreement, and the sugars actually transported under the agreement over the plaintiff in error's lines to Cleveland and points beyond; that thereafter divers "claims for rebate and drawback for and on account of said sugars, transported as aforesaid" were presented by the Sugar Company to the plaintiff in error for payment, and that on April 2, 1903, the plaintiff in error

> "paid, and caused to be paid, to the said 'The American Sugar Refining Company' by way of rebate and drawback, the sum of twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81) for and on account of and by way of the *rebate and drawback* hereinbefore set forth and agreed to, by and between the said companies, for the reduction of the said tariff schedules as aforesaid, said rebate and drawback being so paid upon the claims aforesaid and in respect to the sugar shipped and transported as aforesaid" (p. 5).

The second count omits the averments of the first regarding the alleged agreement between the plaintiff in error and the Sugar Company. After repeating the formal allegations as to the plaintiff in error's through route to Cleveland, the tariff rate, &c., it sets forth that prior to April 2, 1903, the plaintiff in error accepted from the Sugar Company certain sugars to be transported from New York to Cleveland, and received payment therefor

from the Sugar Company at the regular published tariff rates, and that

> "the said railroad company having so transported the said sugars from the said City of New York, by way of the Southern District of New York, as aforesaid, at and in the said District, and within the jurisdiction of this court, on the second day of April, in the said year, did unlawfully and wilfully offer, grant and give to the said 'The American Sugar Refining Company' the sum of twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81) as and for an unlawful *rebate, concession and discrimination*" (p. 7).

The concluding allegation of each count is that the plaintiff in error,

> "in manner and form and by the means aforesaid, in and by the aforesaid payment * * * did unlawfully and wilfully violate the provisions of the said Act to Regulate Commerce and the Acts amendatory thereof, in that the said New York Central & Hudson River Railroad Company then and there did take, receive and collect of and from the said 'The American Sugar Refining Company' in and for the transportation of its said freight and property a less compensation for said services rendered than the said New York Central & Hudson River Railroad Company charged, demanded, collected and received from other persons for doing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions and so was then and there guilty of *unjust and unlawful discrimination;* and did unlawfully offer, grant and give a rebate, concession and discrimination in respect to the aforesaid transportation of said freight and property in interstate commerce" (pp. 5-6, 7-8).

The plaintiff in error interposed a demurrer to the indictment which was both general and special

in form, assigning as objections (*a*) that the acts described did not constitute a crime under the laws of the United State, (*b*) that the indictment did not apprise the defendant with reasonable certainty of the nature of the accusation, and (*c*) that it did not charge the time, place, nature and circumstances of the offense sought to be alleged with clearness and certainty (pp. 8-9).

In overruling the demurrer the court, without passing definitely upon the objection that the indictment was bad for lack of an averment that discrimination or undue advantage resulted from the giving of the alleged rebate, decided that the allegations of the indictment sufficiently supported a charge of violating the provisions of the *Interstate Commerce Act* "prohibiting deviations from the published rate" (p. 11), and that the averment that the alleged payment was "by way of rebate," &c., was "a sufficient allegation that the payment was a wilful failure to observe the published tariff" (p. 12). In the learned Judge's opinion, the indictment was, moreover, sufficiently definite and specific (p. 11).

On the trial the defendant moved, immediately after the jury had been empanelled, that they be directed to render a verdict of acquittal on various grounds, and among others (pp. 20-24):

> 1. That the Elkins Act was unconstitutional and void (*a*) in subjecting "all rail" carriers to rules, regulations, restrictions, pains, penalties and punishments not imposed upon competing "all water" carriers (p. 37 [1] and [2]), in subjecting the defendant to the payment of a pecuniary fine for acts committed by its agents, in which the defendant did not participate (*Id.* [3], [4]), and in imputing to the defendant the commission of a criminal offense and subjecting it to prosecution and punishment by reason of the matters described and set forth in the indictment (*Id.* [5]).

2. That the the indictment was so ambiguous and indefinite as to make it doubtful what was the exact offense intended to be charged (p. 22 [11] and [12]); and

3. That the acts alleged did not constitute any violation of the Elkins Act by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute (p. 23 [23] and [24]); and that the Act did not, and was not intended by Congress to apply to the offering, granting or giving of rebates, &c., in respect of the transportation of property transported prior to its passage, and that inasmuch as it did not appear from anything alleged in the indictment that the payment therein mentioned was made in respect of sugar transported subsequent to February 19, 1903, the facts alleged did not constitute any violation of the Act (pp. 22-23 [15] to [20], inclusive).

This motion being denied, and the case having been opened by counsel for the Government, the defendant, asserting that the indictment was indefinite and uncertain in that regard, moved that the District Attorney be required to inform it whether it was charged with the giving of rebates under the Elkins Act, or with having wilfully failed strictly to observe the tariff rate under that Act, or with a violation of that Act, or of the Act to Regulate Commerce; and this motion having been denied, the defendant asked the court to inform it what its view was as to the nature of the offense charged, in order that it might proceed intelligently with the trial, and with knowledge of the court's views in that regard. The court refused to give the desired information. Exceptions were duly taken in each instance (p. 24).

From the evidence introduced by the Government, which was uncontradicted, and consisted largely of an agreed statement of facts, it

appears that the transaction upon which the indictment was based was as follows:

At the times mentioned in the indictment the plaintiff in error and the Lake Shore and Michigan Southern Railway Company were operating a continuous fast freight all-rail line or route known as the "Red Line" from the City of New York to Cleveland, Ohio, by way of the Southern District of New York (pp. 25-26). By the joint tariff established, filed with the Interstate Commerce Commission and published by the plaintiff in error, and duly concurred in by the Lake Shore and Michigan Southern Railway Company, the rate for the transportation of sugars from New York to Cleveland by this line was twenty-one cents for each hundred pounds (p. 26).

During the same time, and prior thereto there was an all-water route from New York to Cleveland by which the American Sugar Refining Company, a New Jersey corporation, shipped very largely in 1900 and 1901. In 1902 that Company shipped over 18,000 tons of sugar from New York to Cleveland by water routes (p. 31).

On July 24, 1902, Lowell M. Palmer, one of the directors of the Sugar Company, who routed and arranged the rate for practically all of the Company's shipments, had an interview with Fred L. Pomeroy, the plaintiff in error's Assistant Traffic Manager in the latter's office, on the subject of shipments to a warehouse in Cleveland known as the Merwin Street Warehouse, to which the Sugar Company made large shipments that year (p. 29). Nathan Guilford, the plaintiff in error's General Freight Traffic Manager, with whom Palmer had previously had a conversation on the same subject (p. 58), was then away (p. 31). At this interview —at which Thomas P. Riley, of Palmer's office, was also present—Palmer told Pomeroy that the Cleveland Steel Canal Boat Company with whom he had

made a contract in 1898 or 1899 for shipments of sugar to Cleveland by an all-water route, had failed to keep their agreement, that the boats did not arrive in New York harbor in time to make the shipments in accordance with the sugar company's wants, that there was at times so little sugar in the warehouse that customers could not be supplied, and that this had resulted in a lawsuit against the company; and he asked Pomeroy, in view of the circumstances "to make an all-rail route that would enable the company to continue its business at Cleveland" (pp. 29-30). The interview resulted in an arrangement of which the following memorandum was made at the time:

> "Memorandum made July 24th, 1902. Present: Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.
>
> Sugar Shipments to Cleveland and Beyond.
>
> 1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.
>
> 2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4 1/5 cents per 100 pounds.
>
> 3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.
>
> 4th. The New York Central to make reclamation against Mr. L. M. Palmer for refund of 1 1/5 cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.
>
> 5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause in this memorandum on the basis of 6 cents per 100 pounds.

> 6th. This arrangement to apply to all sugar billed to Merwin Street Warehouse whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between the sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds" (pp. 55-56).

Guilford, as General Freight Traffic Manager charged with the general supervision of all freight traffic matters, and Pomeroy as Assistant Traffic Manager, were authorized to establish rates over the plaintiff in error's lines, and to unite with the Lake Shore and Michigan Southern Railway Company in the establishment, filing and publishing of through rates (pp. 27-28); but, obviously, neither of them had authority to reduce or change the Company's own rates, or unite in the reduction or change of a joint rate, except in the manner prescribed by the Interstate Commerce Act. If, when Palmer explained his reasons for asking for making a lower rate to Cleveland than that set forth in the company's published schedule, they believed that the company's interests would not suffer by a reduction, their duty required them to consult the Lake Shore Company with a view to the action necessary to be taken under the statute for that purpose. The plaintiff in error certainly had a right to suppose they would do this, since without it their two superior traffic officials would be guilty of a criminal offense. Instead of this, Pomeroy assumed in Guilford's absence to enter into an agreement for the systematic violation of the Act, in which the only "question which was left open" to Guilford was whether or not the arrangement ap-

plied to shipments reforwarded from Cleveland by roads other than the "Big Four" (pp. 31, 54, 58).

At this time William H. Newman was the president of the defendant corporation. There were five or six vice-presidents. There was also a board of directors numbering a dozen or more "controlling the corporate action of the defendant" (p. 27). But no evidence was introduced that any of the officers or directors had any knowledge whatever of the arrangement. Palmer testified:

> "I never had any conference or conversation on this subject with any officer of the defendant except Mr. Guilford and Mr. Pomeroy . . . I can not, at this time, testify definitely to any conference with any one except Mr. Pomeroy . . . I never had any letter from the president or officer of the defendant relating to this matter except the letter from Mr. Guilford (Ex. 18), and I never showed Mr. Guilford's letter to any officer of the defendant" (p. 32).

Between July 24, 1902, the day the arrangement was entered into, and December 6, following, the various consignments of sugar mentioned in the indictment, amounting to 69,944,966 pounds, were delivered by the sugar refining company to the plaintiff in error for shipment, and were prior to January 1, 1903, transported *via* the "Red Line" from New York to Cleveland, the full tariff rate being prepaid by the sugar company (p. 26).

Five claims aggregating $41,609.76 made up by one of Palmer's employees in accordance with Palmer's understanding as to the amount were presented by the latter. For convenience we will distinguish these claims by the numbers given them in Palmer's office, viz.: 30,240, 30,562, 30,975, 31,530 and 31,874.

1. No. 30,240, amounting to $2,351.33, was "for overcharge in rate on the all-rail sugar forwarded to Cleveland" (p. 51) in July (p. 60).

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*Neither of them was an officer of the Company.

2. No. 30,562, amounting to $11,982.86, was "for overcharge on Cleveland" sugar during the month of August (p. 51).

3. No. 30,975, amounting to $11,721.50, was "for overcharge on Cleveland sugar forwarded via Red Line during the month of September" (p. 52).

4. No. 31,530, amounting to $5,881.13, was "for overcharge on shipments of sugar forwarded to Cleveland via Red Line in October" (*Id.*); and

5. No. 31,874, amounting to $9,672.94 (there being no specific evidence on the point), may be assumed to have covered shipments made between November 1 and December 6 (pp. 27, 53).

Claim No. 30,240 was sent to Pomeroy with a personal letter from Palmer, dated August 19, in which Pomeroy was asked "to have this matter handled promptly" and cheque for the claim drawn to Palmer's order sent to him "at your earliest convenience" (p. 51). Nos. 30,562, 30,975 and 31,530, accompanied by letters in substantially the same form, were sent to Pomeroy September 16, October 14 and November 18, respectively.

None of the claims had then been paid, this doubtless owing to Guilford's continued absence. He presumably returned about this time, for on November 18, Palmer wrote to him asking him to settle the question left open at the interview of July 24 (pp. 54-55). This Guilford did in a letter to Palmer dated November 20 (p. 58), and four days later Pomeroy returned the four claims which had been presented up to that time, to Palmer, with a letter in which he asked Palmer to correct them in accordance with the latter's recent correspondence with Guilford (p. 60). Claim No. 31,874 was probably sent to Palmer, and similarly sent back for correction, after this time.

On January 13, 1903, Palmer returned the five claims "amended to conform to the basis named in Mr. Guilford's letter of November 20, 1902," to

Pomeroy "under personal cover" (p. 53). As originally presented they were stated to be, and on their face purported to be, claims for overcharge at the rate of six cents for each hundred pounds of shipment (p. 32). They were readjusted on the basis of six cents per hundred pounds for all shipments that went to Cleveland and were there reconsigned to points beyond, and four cents on the sugar that was delivered locally in Cleveland (p. 32). As readjusted they aggregated $39,440.30 (p. 27).

On March 18, 1903, Palmer addressed a "personal" letter to Pomeroy calling his attention to the fact that none of the claims had been paid (pp. 53-54). On March 21 Pomeroy replied that the claims were in Mr. Wilson's hands, who advised him that most of them would go through that month's account, and that he ought to be able to pay them by April 15, possibly before (p. 59). On March 23 Palmer again wrote to Pomeroy urging an adjustment (*Id.*), and on March 27th, the claims having been meanwhile audited by a travelling auditor representing the plaintiff in error (after which they were destroyed in the regular course of business so that the claims themselves were not available to either party at the time of the trial), the plaintiff in error gave Palmer "on account" of them a draft to Palmer's order for $26,141.81 drawn on the Chemical National Bank of New York by the cashier of the Bank of Buffalo, dated the previous day, which was liquidated out of the plaintiff in error's funds (pp. 27, 32, 59).

No evidence was introduced showing, or tending to show that any officer or director of the company had the slightest knowledge of the transaction upon which the indictment was based, much less that they were parties to or in any manner concerned in it. On the contrary, it would seem that Guilford and Pomeroy took pains to conceal the

transaction from the officials of the company. Some of the clerical force in the freight department probably knew what was going on. Certainly the company's "travelling auditor" upon whom the officials had a right to rely, should have discovered and reported it, instead of permitting the company's funds to be misappropriated. But there was an utter absence of evidence that the transaction was ever reported to any officer or director, or that they were even put upon inquiry as to its existence.

At the close of the evidence the defendant moved that the jury be directed to render a verdict of acquittal on the grounds, 1, that the Elkins Act did not apply and was not intended to apply to any of the acts specified in the indictment, done or omitted in respect of the transportation of property in interstate commerce prior to its taking effect; that there was no evidence tending to show that at any time after the going into effect of the Act the defendant (*a*) wilfully failed strictly to observe the published tariff rate, (*b*) was guilty of any violation of the Act in respect to the payment or giving or offering of any rebate made punishable under its provisions, or (*c*) committed any violation of the Act; and 2, that the indictment charged no violation of the Act, or of any other statute of the United States. The motion was denied and an exception taken (pp. 33-37).

The learned District Judge charged the jury in substance that if the alleged agreement of November, 1902, was made by officer or agent of the defendant acting within the scope of his employment, the defendant was bound by it" (p. 38).

After quoting the various provisions of the Elkins Act, and briefly reviewing the evidence, he concluded by telling the jury that he understood "from the argument of counsel that the defendant's

defense in the case is a denial of any criminal intent," and that the question for them to decide was, "what was the intent with which that check for $26,000 and odd was paid?"

> "Was it," he said, "paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause? That is the single question in this case for you to determine, and that question I leave for you to pass upon, upon the consideration of all the evidence in the case" (p. 39).

The court refused to charge the jury at the request of the plaintiff-in-error:

> "The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (24th Request, p. 44).

Numerous other requests to charge, presenting the question of the constitutionality of this provision in various forms were made and refused. The rulings of the court, the exceptions thereto and the errors therein appear from the specification of errors. To avoid repetition we omit further reference to these matters here.

When the jury returned to the court and inquired whether "the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law?" the court told them that they might convict the defendant under *any one of three theories* (p. 48).

The jury again retired, and subsequently rendered a general verdict of guilty (p. 49). Motions for a new trial (pp. 49-50) and in arrest of judgment (pp. 50, 61-65) were made and denied, where-

upon the court rendered the judgment now here for review.

SPECIFICATION OF ERRORS RELIED UPON.

The plaintiff in error contends that the Circuit Court erred:

FIRST.

In holding that Congress has power under the constitution to impute to the plaintiff in error the commission of a crime, and to punish it criminally, by reason of the matters described in the indictment (record, pp. 42 [13], 70 [17]; 80 [24] and 100 [23]; 1st assignment of error, p. 100).

SECOND.

"In holding that the said (Elkins) Act, by subjecting this defendant to the payment of a pecuniary fine for acts committed by its agents within the scope of their employment, in which the defendant did not in any manner participate, thus imputing to the defendant and making it punishable criminally for acts which it did not, in fact, commit, does not seek to deprive this defendant of its property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, and was not for that reason, unconstitutional and void" (4th assignment of error, p. 66).

"In holding that Section 1 of the said Act, which declares that in construing and enforcing its provisions the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier, does not infringe the rights, privileges and immunities of this defendant under the said Fifth Amendment, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, thus depriving it of property without due process of law, and that the said section was not for that reason un-

constitutional and void" (5th assignment, p. 66).

In charging the jury:

"Of course in the case of the defendant in this case, if a passenger agent or a person having to do with the traffic department of the business should make a contract for rebates on the carriage of freight, the corporation would not be bound by it; but if the contract is made by an officer or agent of the company, acting within the scope of his employment, the corporation is bound" (charge, p. 38; exception, p. 46; 41st assignment, p. 70).

In charging the jury as follows:

"Of course, there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause? That is the simple question in this case for you to determine and that question I leave for you to pass upon upon the consideration of all the evidence in the case" (charge, p. 39; exception, p. 46; 42d assignment, p. 70).

In refusing to charge the jury:

"The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (24th request, p. 44; exception, p. 47; 62d assignment, p. 72).

In refusing to charge the jury:

> "That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors or any officer beyond the agent who gave the rebate, then the defendant should be acquitted" (3d request, p. 40; exception, p. 46; 44th assignment, p. 70).

In refusing to charge the jury:

> "That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation" (4th request, p. 40; exception, p. 46; 45th assignment, p. 70).

In refusing to charge the jury:

> "That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except said agent, then the defendant must be acquitted" (6th request, p. 41; exception, p. 46; 46th assignment, p. 70).

In refusing to charge the jury:

> "That even if the jury find a criminal intent in an agent or agents of the defendant, the jury cannot impute that intent to the defendant" (13th request, p. 42; exception, p. 47; 52d assignment, p. 71).

In refusing to charge the jury:

> "That the jury cannot make a finding of criminal intent against the defendant and base that finding solely on a finding of criminal intent in an agent or agents of the de-

fendant" (14th request, p. 42; exception, p. 47; 53d assignment, p. 71).

In refusing to charge:

"That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity or by direction of those controlling its corporate action it gave or authorized the giving of the rebate charged in the indictment" (16th request, p. 42; exception, p. 47; 55th assignment, p. 71).

In refusing to charge:

"That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted" (17th request, p. 42; exception, p. 47; 56th assignment, p. 71).

In refusing to charge:

"That even if the jury find as a fact that an agent or agents of the defendant gave a rebate as alleged in the indictment, and that thereafter such rebate was paid by or through other agents of the defendant corporation in Buffalo, still these facts are not of themselves sufficient to warrant a verdict of guilty against the defendant" (21st request, p. 43; exception, p. 47; 60th assignment, p. 72).

In refusing to charge:

"That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy and that as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted" (26th request, p. 44; exception, p. 47; 63d assignment, p. 72).

In refusing to charge:

"That in order to find that an agent or agents of the defendant was or were acting

within the scope of his or their employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent or agents had authority to establish lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment" (27th request, p. 44; exception, p. 47; 64th assignment, p. 72).

In refusing to charge:

"The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment" (29th request, p. 44; exception, p. 47; 65th assignment, p. 72).

In refusing to charge:

"The presumption is that the defendant gave no direction or authority to any of its agents to commit an offense against the United States" (30th request, p. 44; exception, p. 47; 66th assignment, p. 72).

In refusing to charge:

"The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States" (32d request, p. 44; exception, p. 44; 67th assignment, p. 73).

In refusing to charge:

"That in order to find the defendant guilty, the jury must find that the evidence shows beyond a reasonable doubt that the defendant itself was guilty of a criminal intent separate and distinct from any criminal intent of any agent or agents of defendant whom the jury may find gave the rebate charged in the indictment" (34th request, p. 44; exception, p. 47; 68th assignment, p. 73).

In refusing to charge:

"That even if the jury find that some agent or agents of the defendant gave the rebate charged in the indictment and acted

with criminal intent in so doing, yet the jury must not impute such criminal intent to the corporation merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant" (35th request, pp. 34-45; exception, p. 47; 69th assignment, p. 73).

THIRD.

(*a*) In holding that the Elkins Act applied to the giving of rebates in respect of the transportation of property in interstate commerce transported prior to the time it went into effect (18th assignment, p. 67) and that the acts alleged in the indictment to have been done after it went into effect constituted a violation of that act (motion to direct acquittal, p. 22; renewed on the evidence, pp. 33-34; motion in arrest of judgment, pp. 62-63; 21st and 22d and 29th to 32d and 79th assignments, pp. 67-68, 74).

(*b*) In denying the defendant's motion that the jury be directed to acquit when it appeared by the evidence that the transportation of all the goods mentioned in the indictment, or as to which any evidence had been adduced was begun and completed before the passage of the Elkins Act and that there was no evidence showing any wilful feature on the part of the defendant strictly to observe the published tariff rate in respect of the transportation of any property transported after the going into effect or that the defendant had been guilty of any violation after the passage of the act in respect to the payment of any rebate made punishable by the act (pp. 36-37; 39th assignment, p. 69).

(*c*) In refusing to charge the jury:

> "The defendant cannot be convicted of a wilful failure strictly to observe the published tariff rates by reason of anything done or omitted by it, or its agents, after the transportation of property was completed"

(38th request, p. 45; exception, p. 47; 71st assignment, p. 73).

And that

"The alleged payment on Apr. 2nd, 1903, did not constitute a failure on its part strictly to observe its published rate" (39th request, p. 45; exception, p. 47; 72d assignment, p. 73); and

(*d*) In charging the jury in response to its question: "Does the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law?" as follows:

"To that I reply that it does, provided the payment was made with criminal intent" (charge, p. 48; exception, p. 49; 75th assignment, p. 73).

FOURTH.

In overruling the demurrer (7th assignment, p. 66); in holding that the acts described in the indictment constituted a crime (10th and 11th assignments, pp. 66-67); that the indictment apprised the defendant with reasonable certainty of the nature of the accusation (12th and 13th assignments, p. 67), and charged the time, place, nature and circumstances of the offense with clearness and certainty (14th and 15th assignments, *Id.*) that it was not defective for ambiguity and uncertainty (15th and 16th assignments, *Id.*); that it was not defective for the failure to allege the time when the shipments were made (19th and 20th assignments, *Id.*) or to allege that the sums therein mentioned were given in respect of the transportation of property in interstate commerce (23d and 24th assignments, pp. 67-68); that the indictment alleged a wilful failure on the part of the defendant strictly to observe its published tariff rates (25th and 26th assignments, p. 68) and that the acts alleged also constituted a violation of the Act in the offering, granting or giving of a rebate,

commission or discrimination (31st and 32d assignments, *Id.*).

FIFTH.

In denying the defendant's motions (*a*) that the United States attorney be required to inform the defendant whether it was charged with the giving of rebates under the Elkins Act, or with having wilfully failed strictly to observe the tariff rate under that Act; or with a violation of the Elkins Act, or of the original Interstate Commerce Act, and (*b*) that the court inform the defendant what its view was as to the nature of the crime charged (p. 24; 36th and 37th assignments, pp. 68-69).

SIXTH.

In charging the jury as follows:

> "The original Interstate Commerce Act provided that every common carrier carrying on commerce between the states, either alone or by a joint traffic arrangement with connecting roads, should print and keep open for public inspection, schedules showing the rates of fares and charges for transportation of passengers and property which any such carrier has established and which are in force at the time. There are various provisions in detail contained in the Act with reference to these schedules. They are to be filed in the office of the Commission of Interstate Commerce and posted in the stations of the roads, and *deviations from these scheduled rates are declared to be illegal.* When any such common carrier shall have established and published these rates, fares and charges in compliance with the provisions of this section the Act provides that 'it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any service in connection therewith, between any points as to which a joint rate, fare or

charge is named thereon than is specified in the schedule filed with the commission in force at the time'" (charge, p. 37; exception, p. 46; 40th assignment, p. 69).

SEVENTH.

In charging the jury:

"There are three provisions in this Act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

"Under another provision of this act if you find that this defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate, concession or discrimination upon the property transported in this case, 'whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule', you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law" (charge, p. 48; exception, p. 49; 77th assignment, p. 74).

BRIEF OF THE ARGUMENT.

FIRST.

Congress is without power under the Constitution to impute to the plaintiff in error, and subject it to a criminal prosecution and punish-

ment, by reason of the matters described in the indictment.

This point is discussed in our brief in No. 57 (p. 34 *et seq.*).

SECOND.

If correctly interpreted by the Court below, that portion of the Elkins Act which declares that in construing and enforcing the provisions of the first section thereof, "the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person," is unconstitutional. If misinterpreted by the Court below the case was submitted to the jury upon a fundamentally erroneous theory.

This question is discussed at length in our brief in No. 57 (Second Point). It is therefore only necessary to call attention to the rulings of the court in applying to the facts of this case its theory that the purpose and effect of the clause in question was to extend to criminal cases the principle of the civil law whereby masters are held to be liable in damages for the wrongful acts of their servants.

(a) *The view of court appears not only from the rulings on requests to charge and in the main charge, but also from what the court said in denying the motion to direct the jury to acquit.*

After quoting the first clause of the Elkins Act

which he construed as making the misdemeanor of the agent the misdemeanor of the corporation, the learned trial judge said:

> "Upon the evidence in this case, under the Interstate Commerce Act, it would be a proper question for the jury whether Mr. Guilford or Mr. Pomeroy had not committed a misdemeanor, and *therefore*, by this first provision in the Elkins Act, in my opinion, it is a question for the jury *whether the corporation, upon the same evidence, has not committed a misdemeanor*, particularly in view of the provisions in the second paragraph of the Act" (p. 34).

Referring to Mr. Guilford and Mr. Pomeroy, he continued:

> "They were traffic managers of the road, and they had authority, by virtue of their general position, to make contracts for traffic. *They were therefore the persons for whose acts, in accordance with the provisions of this act, the corporation was responsible;* and unless there is something in the subsequent provisions of the Elkins Act affecting the specific language of this first sentence, I do not see why that first sentence does not of itself create misdemeanor, which would be complete and perfect if there was nothing else added to the Act" (p. 35).

(b) *Specific statements of the rulings of the court in denying to the plaintiff in error the right to the presumption of innocence.*

In charging the jury the court said that

> "the original act did not contain any provision under which the corporation as such could be indicted" (p. 38).

and then continued, after quoting from the Elkins Act:

> "So the first sentence or section provides that an action done by such officer or agent which would be a misdemeanor under the original act, shall be a misdemeanor by the

corporation under the Elkins Act" (*Id.*, Exc., p. 46).

The court charged:

"That in order to justify a verdict of guilty against this defendant, it is not enough for the Government to prove that an agent or agents of the defendant offered to give or did give a rebate on sugar carried by this defendant" (Request 2, p. 40).

But destroyed the force of the instruction by saying to the jury:

"I so charge, gentlemen, if this rebate was given for any legitimate purpose you will acquit the defendant, but if it was not given for any legitimate purpose, but was given as a pure rebate in violation of the law upon that subject, then you should convict *the defendant*, if you find the other elements of the case sufficient in other respects" (*Id.*)

The court was requested to charge:

"That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors, or any officer beyond the agent who gave the rebate, then the defendant should be acquitted."

The court said:

"I understand that to raise the point whether a corporation *must* be held criminally liable for the acts of his agents."

Counsel for the plaintiff in error answered:

"It means exactly what I have written, and I think I am entitled to have it charged without modification, or have it refused. I mean that is my position."

The court thereupon continued its charge as follows:

"The Elkins Act provides in the language which I have read to you, that a corporation can be held criminally responsible if its

officer would be held criminally responsible for the same act" (*Id.*).

After quoting from the Act the court continued its charge as follows:

"That is the law applicable to this case, and I therefore decline to charge this third request as it is stated."

(Request 3, p. 40; Exc., p. 46; Assign. of Errors 44, p. 70.)

The court refused to charge the jury:

"That the jury must not guess or conjecture, but the Government is bound to prove, and to prove beyond a reasonable doubt, not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation."

In declining so to charge the court said:

"I decline to charge that in the language as put on the ground of the section of the statutes which I have just read."

(Req. 4, p. 40; Exc., p. 46; Assign. of Errors 45, p. 70.)

The court refused to charge:

"That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors or other executive officers, except said agent, then the defendant must be acquitted."

(Req. 6, p. 41; Exc., p. 46; Assign. of Errors 46, p. 70.)

The court refused to charge:

"That even if the jury find a criminal intent in an agent or agents of the defendant, the jury cannot impute that intent to the defendant."

(Req. 13, p. 42; Exc., p. 47; Assign. of Errors 52, p. 71.)

The court declined to charge

> "That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment, in the absence of proof that in its corporate capacity, or by direction of those controlling its corporate action, it gave or authorized the giving of the rebate charged in the indictment."

In declining to charge, the court said:

> "If by 'the company' is meant that those controlling its corporate action means any officer or person other than Guilford or Pomeroy."
>
> (Req. 16, p. 42; Exc., p. 47; Assign. of Errors 55, p. 71.)

The court declined to charge:

> "That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted."

In declining so to charge, the court said:

> "I decline to so charge, understanding by the term, those who controlled the corporate action, to mean the board of directors or the immediate officers other than Guilford and Pomeroy."
>
> (Exc., p. 47; Assign. of Errors 56, p. 71.)

The court refused to charge:

> "That the jury cannot find the defendant guilty upon a finding that the defendant after the fact ratified or approved of the giving of the alleged rebate."
>
> (Request 20, p. 43; Exc., p. 47; Assign. of Errors 59, p. 72.)

We have cited authorities in our brief in No. 57, showing that this was error.

The court charged:

> "That there is no evidence that those who controlled the corporate action of the de-

fendant authorized or knew of the giving of the rebate alleged in the indictment,"

The court stating, however:

"I charge that if by controlling the corporate action is meant the directors or officers other than Guilford and Pomeroy."

(Req. 22, p. 43.)

The court refused to charge:

"The provisions of the Elkins Act, that in construing and enforcing the first section thereof the act of an agent of the carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

(Exc., p. 47; Assign. of Errors 62, p. 72.)

The court declined to charge:

"That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy, and that as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted."

(Req. 26, p. 44; Exc., p. 47; Assign. of Errors 63, p. 72.)

The court refused to charge:

"That in order to find that an agent or agents of the defendant was or were acting within the scope of his or their employment, the jury must find as a fact, beyond a reasonable doubt, not merely that such agent or agents had authority to charge lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment."

(Req. 27, p. 44; Exc., p. 47; Assign. of Errors 64, p. 72.)

Although the court charged that there was

"no presumption that the defendant gave any of its agents authority to give any rebate,

concession or discrimination charged in the indictment"

(Req. 28, p. 44);

yet it refused to charge:

"The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment";

the court adding:

"I do not think there is any legal presumption about it one way or the other."

(Req. 29, p. 44; Exc., p. 47; Assign. of Errors 65, p. 72.)

The court also refused to charge:

"The presumption is that the defendant gave no direction or authority to any of its agents to permit an offense against the United States,"

the court saying:

"I do not think there is any question of presumption anyway in the matter."

(Req. 30, p. 44; Exc., p. 47; Assign. of Errors 66, p. 72.)

The court refused to charge:

"The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States";

The court saying:

"I decline to so charge, and leave it expressly to the jury."

(Req. 32, p. 44; Exc., p. 47; Assignment of Errors 67, p. 72.)

The court refused to charge:

"That even if the jury find that some agent or agents of the defendant gave the rebate charged in the indictment and acted with criminal intent in so doing, yet the jury must not impute such criminal intent to the corporation, merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant."

(Req. 35, pp. 44-45; Exc., p. 47; Assign. of Errors 69, p. 73.)

The court refused to charge:

> "Even if the defendant can be guilty of a criminal intent, the jury cannot base a finding of such criminal intent solely on the finding of the criminal intent on the part of Fred L. Pomeroy."
>
> (Req. 37, p. 45; Exc. 47; Assign. of Err. 70, p. 73.)

The court refused to charge:

> "That if the jury are unable to determine whether either Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent, that the jury must find a verdict of not guilty."
>
> (Req. 42, p. 45; Ex., p. 48; Assign. of Err. 73, p. 73.)

Finally, when the jury returned for further instructions, the court charged them:

> "If you find upon the evidence in this case that Mr. *Guilford or* Mr. *Pomeroy* was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the *defendant* guilty . . . provided . . . you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law."
>
> (P. 48; Exception, p. 49; Assignment of Error No. 77, p. 74.)

THIRD.

The transaction set forth in the indictment was not punishable under the Elkins Act, which was passed after the property mentioned in the indictment had been transported.

The first count of the indictment alleged that under an agreement entered into *November 20, 1902,* the sugar company made "divers and various

consignments of sugars" which were "actually shipped and transported under the said agreement; but it is not alleged *when* they were so transported (p. 5). The second count is equally silent in this regard, the averment being that the plaintiff in error accepted 'certain sugars' for transportation" prior to the 2d day of April, 1903 (p. 7).

It appeared on the trial, however, that "the various consignments of sugar mentioned in the indictment, amounting to 69,944,966 pounds of such sugars" were delivered to the plaintiff in error between July 24, and December 6, 1902, and that they were transported from New York to Cleveland *prior to January 1, 1903* (p. 26).

The indictment charges the payment of the alleged "rebate and drawback" (first count, p. 5) or, "rebate, concession and discrimination (second count, p. 7) of $26,141.81 on April 2, 1903." The proof showed that on March 27, 1903, Palmer was given a draft for that sum "on account" of his various claims.

The Elkins Act was plainly prospective and not retrospective in its operation. It was intended to apply only to the payment of rebates in respect of shipments made after it became a law.

As the law stood when the Elkins Act took effect, transactions of the character set forth in this indictment which had then taken place, were, so far as corporations were concerned, perfectly innocent; at least there was no criminal liability on the part of the corporation. When Congress legislated in respect of transactions whereby property "*shall be* transported," etc., it obviously spoke as of the date of the Act. If, instead of doing so, Congress had undertaken to make the Act apply to shipments previously made, it would have been of more than doubtful validity, for a federal statute punishing as a crime an act done subsequent to a past completed transaction in inter-

state commerce could scarcely be defended as a regulation of commerce, or as falling otherwise within the proper sphere of Congressional action.

Our position rests upon the elementary rule of construction which requires that a statute must be given a prospective effect unless no other construction is permissible.

U. S. v. *American Sugar Co.*, 202 U. S., 563, 579.

U. S. Fidelity & G. Co. v. *Struthers*, 209 U. S., 306.

Cheu Heong v. *U. S.*, 112 U. S., 536, 559.

Murray v. *Gibson*, 15 How., 421.

U. S. v. *Bryan*, 9 Cranch., 374.

People ex rel. Ryan v. *Green*, 58 N. Y., 295.

State v. *Newark*, 40 N. J. L., 92.

In *U. S.* v. *American Sugar Co., supra*, the court said:

> "Future time and past time are directly opposite, and, by no inadvertence or intention can we believe or suppose that Congress having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other."

In *People ex rel. Ryan* v. *Green, supra*, it was held that a provision in a city charter to the effect that any person holding office under the city government who shall, during his term, accept a seat in the legislature shall be deemed thereby to have vacated his office, was prospective and did not apply to one who held office under the city government at the time of the passage of the act.

In *State* v. *Newark*, 40 N. J. L., 92, the court had under consideration a statute which enacted

> "that in all cases where public notice for a specified purpose is required by law to be given before proceedings are had for the

public sale of lands for unpaid taxes, no certificate of sale or tax title shall be set aside and holden for naught, by reason of any variance between the date of such notice and the actual publication thereof, provided that notice *shall have been, or shall be,* actually given for the specified number of days prior to such proceedings for public sale."

The court said:

"It is claimed that the words 'shall have been,' in the proviso, relate to the past; that their effect is to heal all irregularities in notices named in the act, which have occurred prior to its passage, and that the statute is intended to be retrospective. It is, however, obvious that all the terms used in this act are prospective, and apply only to the future. This is so, without dispute, in that part of the section which precedes the proviso. In the latter part of the sentence, the only words that are alleged to have retroactive signification are those already quoted—'shall have been.' *These words, and the following words 'shall be' will not, however, relate to acts that were past when the law was enacted. 'Shall have been' is the future perfect tense, which represents an event as completed in future time and 'shall be' represents what will take place in future time. If the legislature had intended to make the law retroactive, it would have been easy to express it by the use of the words has been* or *had been,* in the present or past perfect tense, or other equivalent words. For an instance of such expression see the Act of November 16th, 1795, concerning wills, Section Nine, construed in *Corlies* vs. *Little,* 2 Green, 384. The words there used are 'where any lands have been or shall be given or devised, &c., or have been or shall be thereby ordered or directed to be sold,' &c. The Court will not assume that the draughtsman of the act was a bad grammarian, in order to make the law retroactive, where there is no other expression in it which indicates such a purpose. There will

be no intendment in favor of a retroactive construction. *The rule is to construe all legislative acts prospectively, unless there be a clearly-expressed purpose to make them retrospective and the language used must be so clear and imperative as not to admit of doubt.*"

Applying the rule laid down in all the accepted authorities, we must assume that when Congress enacted that the payment of rebates by corporations, theretofore not a criminal offense, should constitute a crime, *when thereby property "shall be" transported* in interstate commerce at less than the published schedule rate, it did not mean *"when thereby, property 'shall have been'"* so transported.

FOURTH.

The acts set forth in the indictment did not constitute a crime under the Elkins Act, or under any other federal statute.

(*a*) In his opinion overruling the demurrer the learned District Judge after observing that the *Hanley* case, held "that the payment of a rebate from the scheduled rates violated the provisions of the act (of 1887) prohibiting deviations from the published rates," said:

> "The allegations of this indictment certainly support that charge sufficiently" (p. 11).

The learned District Judge had in mind (as appeared when he came to charge the jury; p. 37) the provision contained in the fourth paragraph of Section 6 of the original Interstate Commerce Act, as follows:

> "And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, col-

> lect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

Since it is made manifest by the language of the indictment itself that neither the pleader, nor the Grand Jury, intended to charge a violation of this provision, it did not lie within the province of the court below to change the nature and character of the charge in accordance with the strange notion evolved in the *Hanley* case that the *payment* of a rebate is the same thing as *charging, collecting or receiving* a less compensation than that specified in the published schedule.

But the indictment would be utterly worthless if subjected to this extraordinary method of reformation, for the provision of the Interstate Commerce Act above quoted, being in conflict with the second clause of the Elkins Act, making corporate carriers liable criminally only for *wilful* failures strictly to observe the published tariffs, was expressly repealed by the latter statute (section 4).

Moreover a corporation was never indictable under the Act of 1887, individuals only being criminally liable.

(*b*) In the opinion of the learned District Judge the fact that the indictment alleged the payment of the full rate and the subsequent payment of a rebate or concession was *also*

> "a sufficient allegation that *the payment* was a wilful failure to observe the published tariff" (p. 12).

The Grand Jury, however, presented the plaintiff in error upon another and wholly different theory. If, in spite of this, the indictment could be regarded from the standpoint last suggested, it is nevertheless fatally defective, *first*, in omitting to

allege *directly* any *wilful* failure on the part of the plaintiff in error, strictly to observe its published tariff, and *second*, in omitting any averment as to the time, place, or manner in which it was intentionally delinquent in that regard.

The court below thought that the *payment* of the rebate after the receipt of the schedule rate was equally the *receipt* of a less compensation that that specified in the schedule, and a wilful failure strictly to observe the latter. If so, did the default supposed to be charged either by way of "deviation" or "wilful failure" take place when the unlawful agreement was made, or when the rebate was paid? This is important. Whatever it may have been, the plaintiff in error was entitled to know the theory of the pleader, for upon the former hypothesis the prosecution was outlawed before the case was sent to the Grand Jury, and, as we have said, a corporation was never liable criminally for "deviation" under the Act of 1887.

(*c*) If the indictment is to be treated as an attempt to charge the giving of a rebate in violation of the Elkins Act it is fatally defective for lack of an agreement of unlawful advantage or discrimination.

Although the court below did not pass definitely upon the plaintiff in error's contention that this was an essential element of the offense, the pleader did; and he decided the point in accordance with our view. Consequently an attempt was made in both counts to charge "unjust and unlawful discrimination" (see concluding paragraphs, pp. 6, 7-8). But the only averment of this element is that contained in the third paragraph of each, to the effect that at all the times mentioned the published rate "was the rate charged, demanded, collected and received by the (defendant) from *other persons* than 'The American Sugar Refining Company' below

mentioned for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned" (pp. 4, 7).

It is subsequently alleged, that on April 2, 1903, the defendant paid the Sugar Refining Company a sum of money "by way of rebate and drawback," &c. (first count, p. 5), and "as and for an unlawful rebate, concession and discrimination" (second count, p. 7); but it is not alleged in either count that similar rebates or discriminations were not allowed to other shippers, nor is any specific instance of actual discrimination otherwise shown. Both counts, therefore, fail to charge the giving of a rebate or the employment of any other device whereby advantage was given or discrimination practiced.

United States v. *Hanley, supra,* 71 Fed. Rep., 672.

(*d*) The indictment fails to charge a violation of the rebate provision of the Elkins Act in that the payments mentioned are not alleged to have been made in respect of the transportation of property in interstate commerce.

The allegation of the first count is that the sum therein specified was paid by the defendant

> "by way of the rebate and drawback hereinbefore set forth and agreed to, by and between the said companies, for the reduction of the said tariff schedules as aforesaid, said rebate and drawback being so paid upon the claims aforesaid and *in respect to the sugar* shipped and transported as aforesaid."

This is not equivalent to an averment that the defendant offered, granted or gave any particular rebate, concession or discrimination in respect of *the transportation* of any particular property whereby the same was transported at less than the published tariff rates, &c.

The allegation of the second count is merely that the defendant offered, granted and gave the money

"as and for an unlawful rebate, concession and discrimination." It is not even alleged that it was given in respect of the transportation of property.

(c) *In any view the indictment is bad either for duplicity, or for ambiguity.*

If, as the court below decided in sustaining the demurrer, the indictment charges in the same counts a "deviation" in violation of the original Interstate Commerce Law as well as a "wilful failure" in violation of the Elkins Act, and also charges, as the court held on the trial, the offense of giving rebates in violation of the latter Act, it is plainly bad either for duplicity, or for ambiguity and uncertainty.

When several acts relate to the same transaction, and together constitute but one offense, they may be charged in the same count, *but not otherwise.* Each count in an indictment must stand or fall by itself. *The jury cannot find a verdict of guilty as to one part and not guilty as to another part of the same count.* This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called to defend, and that the court may know what sentence to pronounce.

State v. *Smith,* 61 Maine, 386.

In the case cited there were two indictments under a statute which subjected travelling dealers and pedlars in intoxicating liquors to a penalty "for each offer to take an order, and for each order taken, and for each sale so made." One of the indictments contained two counts, one alleging that the defendant travelled from place to place "carrying for sale, and offering to obtain, and obtaining orders for the sale and delivery" of intoxicating liquors; and the other containing the same allegations with the additional averment that while so travelling the defendant obtained from a person named an order for the sale and delivery of certain

liquors. The second indictment contained four counts. The first count was similar to the second count of the first indictment with further averments of obtaining other orders; the second count set forth in addition to the general averments of the other counts that the defendant "did then and there offer to sell to one William S. Jacobs * * * and did offer to obtain an order for the sale of and delivery to the said William S. Jacobs, a certain quantity" of liquor, and also a similar averment of an offer to another person; the third count contained all the allegations of the other counts and the last was substantially the same as the first count of the first indictment.

The court, after referring to the provisions of the statute, said:

> "It is as much an offense to offer to take an order as it is to take one, and *vice versa*. To make a sale is as much an offense as either of the other prohibited acts. Each of these acts is independent of each other and constitutes a complete substantive offense. A conviction for one of these acts does not imply or involve a conviction for either or both of the others. Moreover, the penalty affixed to each of them is distinct and entire, and cannot be apportioned upon two or more of them. These several offenses being of the same nature, defined in the same section of the statute, and punishable with the same penalty, may doubtless be properly charged in separate counts of the indictment, though they cannot be embraced in the same count. In that case each count would present a single issue, and if sustained, would subject the accused to a certain specified penalty. Not so if all the three offenses, or either two of them, are grouped together in one count. There would then be as many issues as there are offenses charged, each requiring a different mode of proof. The evidence might warrant a conviction upon one of the offenses charged, but not upon the others. But

the jury cannot split up a count in an indictment, and find the accused guilty of a part, and not guilty of the balance; their verdict must be an entirety. Besides, what sentence in such case must the court pronounce upon the conviction of the accused? Must it impose the penalty affixed to one of the offenses only, or the sum of the penalties affixed to all of them? If the former, the accused escapes with a part of the penalty the law attaches to his acts; if the latter, the Court assume and decide that the accused has been convicted of several offenses charged in one count."

In *Rice* v. *Standard Oil Co.*, 134 Fed. Rep., 464, 465, 466, the court said:

"The Act makes a distinction between a contract and a combination or conspiracy. . . . Each of these things the act condemns as an unlawful thing. They are not confused in the act, but are mentioned as distinct offenses. Good pleading, whether it be in an indictment in a criminal proceeding or in a declaration in a civil suit, requires the same distinction to be observed. *If in a single count in an indictment the charge should be that the defendant entered into a contract, combination, and conspiracy in restraint of trade or commerce among the several States, it would be bad for duplicity.*"

If not objectionable on the ground of duplicity, then the indictment is certainly bad for ambiguity.

It is always necessary to specify on the face of the indictment

"the criminal nature and degree of the offense which are conclusions of law from the facts; and also *the particular facts and circumstances which render the defendant guilty of that offense.* 1st. In order *to identify the charge,* lest the Grand Jury should find a bill for one offense, and the defendant be put upon his trial in chief for another, without any authority."

1 *Stark, Cr. Pl.* (1st Ed.), 73.

If this indictment is susceptible of the construction that it charges, an offense under the Interstate Commerce Act, *and* an offense under the Elkins Act, either in the giving of rebates, *or* a wilful omission strictly to observe lawful tariff rates, *or* otherwise; *or* more than one offense of any character; *or* if it is uncertain what precise offense is charged, it is bad, for an indictment must be

> "free from all ambiguity, and leave no doubt in the minds of the accused and the Court of *the exact offense intended to be charged.*"
>
> *Ledbetter* vs. *United States,* 170 U. S., 606, 610.

FIFTH.

The Circuit Court erred in refusing to require the United States attorney to inform the defendant what the precise nature of the charge in the indictment was, and also in refusing to inform the defendant of its view in that respect.

We have seen that according to the construction put upon it by the court prior to the trial, the indictment might be regarded as sufficiently charging any one of three offenses. It may be that the court properly deferred until the trial, a definite ruling as to precise nature of the accusation; but it cannot be that the defendant should after that be still left in doubt as to the identity of the charge. The defendant took the only course open to it to obtain a ruling on this point. Its effort was without result. The charge threw no light upon the subject, and to this day it knows no more about the court's attitude in the matter than it did at the trial, for under a charge which permitted a verdict of guilty upon any one of three theories, the jury returned a general verdict of guilty.

SIXTH.

The court below erred in charging the jury concerning the provisions of the original Interstate Commerce Act, and particularly in charging them that "deviations from these schedules are declared to be illegal."

The portion of the charge in which the court made use of the language above quoted (charge, p. 37) was duly excepted to (p. 46) and is set forth at length in the 40th assignment of error (p. 69).

Standing alone, the instruction might perhaps have been regarded as harmless. But the court subsequently charged the jury that they might convict the defendant if they found

> "that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving . . . a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the Commission" (charge, p. 48; exception, 47; 77th assignment of error, p. 74).

The jury were thus instructed that they might find the defendant guilty not only of an offense not charged in the indictment, but of an offense defined and made punishable by a statute which had been repealed.

SEVENTH.

The Circuit Court erred in charging the jury that they might convict the defendant, (1) if they found Mr. Guilford or Mr. Pomeroy guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation . . . than the rate specified in the sched-

ule; (2) if they found that the defendant had been guilty of a wilful failure to strictly observe the tariff filed or, (3) if they found that the defendant had granted or given any rebate, concession or discrimination, etc. Charge, p. 48; exception, p. 49; 77th assignment, p. 74.

The indictment did not attempt to charge a violation either of the 6th section of the Interstate Commerce Law, or of the second clause of the Elkins Act. The "deviation" provision of the Act of 1887, moreover, had been repealed by the Elkins Act. The offense of giving rebates, insufficiently and ineffectually alleged, was the only offense even attempted to be charged. Yet the jury were instructed that they might convict the defendant on any of these three supposed crimes. It is not only quite conceivable, but extremely likely, that it was convicted of violating the repealed law, or of a wilful failure strictly to observe its tariff. In either case it was guilty of no crime of which it stood accused. There was, of course, no failure on its part strictly to observe its tariffs at any time after the passage of the Elkins Act. If it failed to observe them at all it did so when, in November, 1902, three months before the passage of the Elkins Act it agreed to pay back a portion of the schedule rate. But, in any event no such offense was charged, nor, as we have shown, was any offense even attempted to be charged except that of giving an unlawful rebate.

Nothing could be clearer than that the jury was instructed that they might find the defendant guilty, and that by their verdict they may have convicted it, upon at least two different theories which were not charged in the indictment, or contemplated

either by the framer of the indictment or the Grand Jury that returned it.

CONCLUSION.

The judgment of the Circuit Court should be reversed and the proceedings remanded to that court with instructions to sustain the demurrer and discharge the defendant.

Respectfully submitted,

AUSTEN G. FOX,
JOHN D. LINDSAY,
ALBERT H. HARRIS,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM 1908.

THE NEW YORK CENTRAL AND HUDSON RIVER RAIL ROAD COMPANY, Plaintiff-in-error, vs. THE UNITED STATES.	No. 69.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

Statement.

This case comes up on a writ of error after conviction of the plaintiff-in-error upon an indictment charging it with the payment of a rebate of $26,141.81 to the American Sugar Refining Company in violation of the Interstate Commerce Act of February 4, 1887, and its amending statutes including the Elkins Law of February 19, 1903. The material provisions of these laws are set out hereafter in the brief. The indictment was filed on March 24, 1906, and contained two counts, both charging as an offense the same transaction and differing only as to the form of allegation. After its demurrer had been overruled (Rec., p. 10; 146 Fed. Rep., 298) the defendant pleaded not guilty and was tried on November 14, 1906, on both counts, the trial resulting in a general verdict of guilty, and it was sentenced to pay a fine of $18,000.

The Indictment.

The first count of the indictment, after setting out the formal averments showing the establishment of the interstate through line in question from New York to Cleveland, and the establishment, filing and publication of the lawful tariff upon sugar over it fixing the rate as twenty-one cents per hundred pounds, charges that on November 20th, 1902, the defendant railroad company entered into an unlawful agreement and arrangement with the shipper, The American Sugar Refining Company, whereby it was agreed that in the event of any sugars being shipped over the said line and of the full lawful tariff rates being paid thereon, the railroad company would give a rebate to the said shipper of six cents for each one hundred pounds of sugar transported to Cleveland for reconsignment to points beyond, and four cents for each one hundred pounds transported to Cleveland locally, the said sums, respectively, to be refunded from the lawful amounts paid as aforesaid; that the shipper should present its claims for rebate under the agreement aforesaid and the same should be paid by the railroad company, thereby reducing the lawful tariff by six cents or four cents respectively for each one hundred pounds. The indictment then charges the shipment of sugars under said agreement, the payment of the lawful tariff rates and the presentation of claims for rebate in respect to such shipments of sugars (the amount of each claim, its items and the time of its presentation being to the grand jurors unknown); that thereafter on April 2, 1902, the railroad company paid to the American Sugar Refining Company $26,141.81 by way of rebate for the reduction of the tariff schedules as aforesaid in respect to the transportation of the said sugars under the aforesaid agreement.

The second count of the indictment is substantially the same as the first except that the allegation of a preliminary agreement to pay rebates is omitted.

The Facts Established at the Trial.

The facts in this case evidenced the same reckless disregard of the law on the part of the controlling agents of the railroad company, even at a time when, under the Law of 1887, they were still liable to imprisonment for such actions, as is shown by the Record in Case No. 57 against the same defendant. The transaction was also arranged and carried out with the same effort to conceal its nature from the public and from competitors, as evidenced by its form and by the marking of the correspondence. The evidence as to the methods of bookkeeping and payments in Wilson's office in Buffalo, shown in the other case, was here made unnecessary by the defendant's admission as to the auditing and destruction of its papers, at folio 57.

The following facts were established :

(*a*) That the defendant railroad company, in connection with other carriers and over their respective railways, at the times mentioned in the indictment and during the years 1902 and 1903, had established and was operating a continuous fast freight line or route known as the "Red Line" from the City of New York to the City of Cleveland, Ohio (see waybill, Exhibit 2; rec., fols. 43, 44, 45).

(b) That the defendant had established and filed and published a joint tariff of rates for the transportation of sugars over said route by which at all the times mentioned in the indictment the rate for transportation from New York to Cleveland was 21 cents per 100 pounds (Rec., fols. 45, 46, and Exhibit 1).

(c) At all the times mentioned in the indictment Nathan Guilford and Fred. A. Pomeroy were the general freight traffic manager and assistant freight traffic manager, respectively, of the defendant railroad company and "were authorized to establish rates at which freight should be carried" over its lines, and "to unite with other companies in the establishment, filing and publishing of through rates" (fol. 49; see, also, Exhibits 13, 14, 15, 16 and 17). The witness Palmer

also testified that he had "had occasion to discuss rates over the New York Central and Hudson River Railroad Company" with Guilford and Pomeroy and had "arranged rates over that road with them," and that "those rates have subsequently been carried out by the railroad company" (fol. 51).

(d) That at said times the American Sugar Refining Company was a New Jersey corporation engaged in refining sugar in Brooklyn and Jersey City and selling it throughout the country, and in the course of this business made large shipments to a storage warehouse furnished to it by the Big Four Railway Company (fol. 97) in Cleveland, known as the Merwin Street Warehouse (fols. 46, 50, 51, 97). The sales department of the Sugar Company routed the sugar which it sold to different parts of the country over various railroad routes according to instructions received from Lowell M. Palmer, one of the directors of the Sugar Company (fol. 50). Palmer maintained a regular office at which he handled the railroad business of the Sugar Company, furnishing the sales department the railroad rates at which the sugar was to be shipped, and arranging the routes for such shipments. He also handled claims of the Sugar Company against the different railroads that handled this freight. He was thus the regular traffic manager of the Sugar Company (fols. 50, 51).*

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* *Note*—Palmer also conducted at the same office a lighterage business in which he was engaged individually as partner of the firm of Havemeyer & Elder, the business consisting of transporting in lighters the sugar of the Sugar Company of which Palmer and Havemeyer were officers from the wharves in Brooklyn and Jersey City to the terminals of the various railroads and receiving a certain percentage of the railroad rates for this service. The "lighterage" referred to in the exhibits hereinafter mentioned refers to these charges and has nothing to do with the rebates in question (see fols. 54, 55). The American Sugar Refining Company was also allowed by the railroads out of the railroad rates an allowance of 2 cents per 100 pounds for cartage or transfer on certain all-rail shipments of sugar. This is the cartage referred to in said exhibits and has nothing to do with the rebates (fol. 55).

(e) On the 24th day of July, 1902, Palmer, with his assistant Riley, at the office of Pomeroy, demanded from the defendant railroad company a concession from the regular tariff rate of 21 cents then in force from New York to Cleveland as aforesaid (fols. 51, 52, 53). He testified as his reason for doing this that a cheaper water route which the Sugar Company had been using to Cleveland by the Cleveland Steel Canal Boat Company had proved unsatisfactory, and he desired to have an all-rail route at this special rate to take its place (fol. 52). This demand was acceded to by Pomeroy, and a memorandum (Exhibit 12), was made of the agreement. This agreement was as follows:

"MEMORANDUM MADE JULY 24, 1902.

Present—

Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

Sugar Shipments to Cleveland and Beyond:

1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.

2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4-1/5 cents per 100 pounds.

3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.

4th. The New York Central to make reclamation against Mr. L. M. Palmer for a refund of 1-1/5 cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

5th. *Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause of this memorandum on the basis of 6 cents per 100 pounds.*

6th. This arrangement to apply to all sugar billed to Merwin Street Warehouse whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds.

(*f*) Later, on November 20th, Palmer wrote directly to Guilford (Exhibit 11) and received a reply (Exhibit 18) which fixes the rebate to be allowed on city deliveries in Cleveland at 4 cents as against the 6 cents rebate allowed on shipments for reconsignment beyond Cleveland.

(*g*) Between July 24, 1902, and December 6, 1902, the American Sugar Refining Company shipped 69,944,966 pounds of its sugars from New York to Cleveland over the line to which this agreement applied and paid thereon the full tariff rate of 21 cents per 100 pounds and no more (fol. 46).

(*h*) Thereafter Palmer, purporting to act for the Sugar Company, filed claims against the New York Central for the amount of the rebates agreed upon as aforesaid (fol. 47; see also Exhibits 3, 4, 5, 6, 7, 9, 21, 20, 22; also fol. 57). These claims, though on their face purporting to be for overcharge, were made up by one of Palmer's employees solely upon the basis agreed upon for the rebates and without any evidence of loss or damage or overcharge whatsoever (fols. 57, 58, 59). Each of the claims were addressed to Pomeroy marked "personal" (see exhibits above).

The Issue.

The plaintiff-in-error raises in this case the questions considered at length in No. 57. Certain formal objec-

tions to the indictment are also made. The main question, however, involved here is the assignment of error to the Court's refusal to direct a verdict of acquittal upon the ground that the evidence disclosed that the shipments of sugar as to which a rebate was paid were made in 1902 prior to the enactment of the Elkins Act, although the rebate was paid in March, 1903, after that Act was in force (fol. 60).

Judge HOLT denied the motion (fols. 60–65) after hearing elaborate argument by Mr. Choate who appeared as *amicus curiæ*, and as counsel for the shipper, the American Sugar Refining Company.

The issue briefly stated is this :

Does the payment of a rebate after the Elkins Act was in force constitute an offense under the Interstate Commerce laws, including Section 1 of the Elkins Act, although the agreement to charge less than the lawful tariff rate and the shipments pursuant thereto, in respect to which the rebates were paid, were made prior to the Elkins Act and while the Interstate Commerce Act of 1887 was in force ?

Outline of the Government's Replies to the Brief of the Plaintiff-in-Error.

FIRST. Plaintiff-in-error's point that Congress has no power under the Constitution to punish it criminally by reason of the matters described in the indictment, is answered by our Point One in our case No. 57.

SECOND. Plaintiff-in-error's Second Point, which is in substance that the provisions of the Elkins Act, declaring that " the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier as well as of that person," is unconstitutional, is answered by Points Two and Three of our brief in case No. 57.

THIRD. Plaintiff-in-error's contention that the transaction set forth in this indictment was not punishable

under the Elkins Act because that act was passed after the property mentioned in the indictment had been transported, is discussed in the present brief under Points One, Two, Three and Four.

FOURTH. Plaintiff-in-error's Fourth Point, to the effect that the acts set forth in this indictment did not constitute a crime under the Elkins Act or under any other federal statute, is discussed in the present brief under Point Three.

FIFTH. Plaintiff-in-error's contention in Points Five, Six and Seven of its brief, are answered in Points Three and Five of the present brief.

The Statute.

The Elkins Law (32 Stat., 847) reads as follows:

> That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it

shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisoned wherever now prescribed as part of the penalty being here abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offence had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any

officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

ARGUMENT.

POINT ONE.

Under the law as it stood before the Elkins Act, the agreement of July 24th, 1902, was unlawful and its fulfillment a crime on the part of the agents of the carrier.

The agreement in question contemplated the making of certain shipments, the payment of the freights thereon at regular tariff rates and the repayment at a future time of a certain portion of these rates as a rebate.

1. Looked at commercially this was a continuous transaction which would not be complete until the final payment of the rebate reduced the compensation

of the carrier to the amount agreed upon between the parties. During all of that continuous period, there would be pending a continuous interstate transaction between the shipper and the consignee, every step of which was subject to Congressional control.

2. Looked at from the standpoint of the already existing Interstate Commerce Act, it was also an illegal and criminal arrangement which

(a) made the agents of the carrier criminally liable in case they completed the crime by the payment of the rebate (Interstate Commerce Act, Secs. 6 and 10, 24 Stat. 379, 1 Supp., 529), and

(b) was by reason of its illegality wholly unenforceable against the carrier corporation.

The carrier corporation could, at any time, decline to complete the transaction by the payment of the rebate.

Texas & Pac. Ry. Co. vs. Mugg, 202 U. S., 242.
Gulf R. R. Co. vs. Heffley, 158 U. S., 98; see, also,
Hawley vs. Kansas Coal Co., 48 Kans., 593, 598.
Fitzgerald vs. Grand Trunk Railway Co., 63 Vt., 169.

3. From these considerations, it is apparent, first, that the entire transaction was under federal jurisdiction, and second, that no vested rights had intervened in favor of any party which would prevent Congress from exercising such jurisdiction.

N. Y., N. H. & H. Ry. Co. vs. Interstate Commerce Commission, 200 U. S., 361;
Armour Co. vs. United States, 209 U. S., 56.

On the contrary, the human agents of the corporation would be criminals under already existing law, if they carried it out, and the transaction on the part

of their corporation, though not yet criminally punishable, was already denominated illegal under the law (Interstate Commerce Law, Sec. 6).

POINT TWO.

The avowed purpose of the Elkins Act was to make the existing law more effective.

For at least ten years prior to the enactment of the Elkins Law, the Interstate Commerce Commission had reported annually to Congress the ineffectiveness of the existing law and had suggested amendments which would make it more effective. Thus, in 1902, just before the Elkins law was enacted it reported :

> " The Commission believes to-day, as it has in the past, that this whole law should be revised upon some correct theory and some workable basis. * * * It is possible, however, that the same causes which have prevented serious consideration of this subject in the past may continue to operate in the future. In that event, in view of the gross violations of the statute herein referred to we would suggest that if it is not possible to amend this law in its more essential features, it ought at least be possible to deal with those coercive features of the act which are intended to prevent practices of this character "
>
> 15 An. Rep. Int. Com. Com., 7.

See, also,

4 An. Rep. Int. Com. Com., 666.
6 *id.*, 39.
10 *id.*, 115.
11 *id.*, 60.
14 *id.*, 5.
16 *id.*, 6.

There had been in 1901-1902 an investigation into the beef packing industries, which resulted in the disclosure of widespread violations of the existing law (15 An. Rep. Int. Com. Com., 6).

In the House of Representatives, when the Elkins Bill was under debate, Mr. Hepburn, its sponsor, asserted that during the sixteen years of the existence of the law of 1887, not one single criminal conviction had been obtained, and that it was the purpose of the new bill to " remedy that difficulty " (36 Cong. Rec., pp. 2151-2159).

The courts have frequently commented upon this well-known purpose of the Elkins Law.

Armour Packing Co. vs. United States, 209 U. S., 56, 72.

N. Y., N. H. & H. R. R. Co. vs. Interstate Commerce Commission, 200 U. S., 361, 391.

Interstate Commerce Commission vs. Reichman, 145 Fed., 235, 240.

There can be no doubt, therefore, as to the purpose of Congress to pass a law which would be immediately drastic and effective.

POINT THREE.

The payment of the rebate charged in the indictment and established by the evidence was a crime punishable under the Elkins Act, although the goods in question had been transported prior to the enactment of that law.

A.

An analysis of the first section of the Elkins Law, as well as its history, shows that its several provisions over-

lap and that certain cases may be punishable under either of several clauses.

As has been already pointed out, the Elkins Law was passed on the urgent recommendation of the Interstate Commerce Commission, setting forth that the old law was being violated and that certain forms of abuses and evasions were prevalent. The Commission had reported specifically as to these abuses and had recommended specific bills to put an end to them. When in 1903, Congress finally enacted this legislation, it did so in the form of specific prohibitions aimed at the respective abuses pointed out by the Commission rather than by a single treatment of the entire group of subjects such as is found in the original law. But the central object of the law, as it had been the most emphatic recommendation of the Commission, was that any departure from the published tariff should be made *ipso facto* punishable criminally, by all persons concerned, the carrier and the shipper, the corporation and the natural person. The various provisions of Section One arise from an attempt to cover all of the methods by which a violation of this central object might be achieved.

It must be evident, therefore, that a single state of facts may necessarily come under and be described by more than one of these provisions of the law. The payment back by the carrier to the shipper of a certain sum of money under certain circumstances will result at one and the same time *(a)* in that carrier "collecting a less compensation for the transportation of property than is specified in the schedule filed with the Commission in force at the time" and *(b)* in the "willful failure" on the part of that carrier "to strictly observe such tariffs," and *(c)* in the payment of a "rebate" whereby certain property is "transported at a less rate than that named in its tariffs."

In such a case it is quite immaterial whether Congress has in this law created three distinct but precisely similar crimes, each of which a given state of facts

satisfies; or whether Congress has attempted to create but a single crime denounced under three distinct descriptions.

Provided that the charges stated in the indictment are sufficient within the rules of pleading to constitute a crime and to sufficiently apprise the defendant as to what he has to meet, it is immaterial how the offense is labeled.

Williams vs. United States, 168 U. S., 382.

The situation as presented by this statute is not unlike that presented under section 5421 of the Revised Statutes, which was discussed in the Crain case by this Court:

> "The statute was directed against certain defined modes for accomplishing a general object and declared that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than one thousand dollars. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to the accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced in it."
>
> *Crain vs. United States, 162 U. S., 625, 636.*
> See, also, *Kellogg vs. United States, 126 Fed. Rep., 323 (C. C. A.).*

The argument in the third point of our opponent's brief addressed to the question of the validity of the

Elkins Law as to shipments made prior thereto, goes upon the assumption that this issue is to determined solely by the language of the so-called rebate clause of the Elkins Law. This is a wholly unfounded assumption. On the contrary, as the court below pointed out, the charge and the proof substantiated an offense denounced in two other clauses of the Elkins Law. These we shall take up in their order.

B.

The record shows an offense under the first sentence of the Elkins Act.

This sentence makes the corporate common carrier liable for every misdemeanor committed by its agents under the Interstate Commerce Law. The indictment herein sets forth and the uncontradicted evidence establishes that the officers and traffic agents of the railroad company willfully "charged, collected and received" from The American Sugar Refining Company "less compensation for the transportation of the property than was specified in the schedule filed with the Commission in force at the time" (Interstate Commerce Law, Sec. 6; 24 Stat., 380). And this, under section 10 of the old law, was a misdemeanor on their part. Until April 2, 1903, the full tariff rate had been paid. Not until the actual payment of the rebate was the offense of collecting less compensation than the tariff provided completed.

> "The objection that the indictment does not state the day or days upon which the shipments were made is, in my judgment, equally unsound. The transaction, as it turned out, was a continuing one until closed by the payment of the rebate, and was at no time unlawful until the rebate was paid. The payment of the rebate, as a single transaction, individualized the whole transaction to which it related as of that day. Each and all

of the shipments upon which the rebate was paid may be regarded as a transaction closed upon the date the rebate was paid, and it is sufficient to state a transaction as of the day it was closed. Neither is it necessary to charge that, when the shipments were made, it was intended to demand and receive a less rate than the schedule rate, and that the subsequent rebate was only the actual carrying out of such intention. The parties may not have intended to violate the law when the shipment was made, but are none the less guilty if, by any subsequent conduct, fairly connected therewith, they compassed the result which the law prohibited."

United States vs. Hanley, 71 Fed., 672, 675.

The same ruling was made by Judge HOUGH in the recent case of *United States vs. Great Northern Railroad Company*, 157 Fed. Rep., 288, arising under the Elkins Act :

"When the transaction was completed the Elkins Act had made each and every part thereof not only unlawful but a criminal offense. One part thereof and certainly the most important was giving the rebate and accepting the same and it is a refinement of language to say that the rebate was given or accepted until the amount thereof was paid. This occurred in 1904 and this Act was the crime complained of in the indictment. A solvent contractor may be said to have given some pecuniary advantage to another when he has agreed to give it, his contract being enforceable in ordinary course of law; but if a man agrees to give another an unlawful pecuniary advantage something not enforceable at law at all, it appears to me plain that the person to whom the promise is made has gotten nothing whatever until he has received and pocketed the pecuniary fruits of such illegal arrangement."

C.

The record discloses "a willful failure strictly to observe the published tariff," which is an offense under the first clause of the second sentence of the Elkins Act.

Prior to April 2, 1903, the published tariff was observed. It needs no additional argument to demonstrate that not until the payment of the rebate on that day was there a failure to observe the published tariff.

D.

The record discloses the giving of a rebate in violation of the second clause of the second sentence of the Act.

This clause, which is the one upon which our opponents' entire argument rests, reads as follows :

> " And it shall be unlawful for any person, persons, or corporations to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carriers as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination practiced " (32 Stat., 847).

Our opponents' argument involves two contentions :—

(1) That the relative clause " whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs," etc.,

refers solely to the physical transportation of the goods, and

(2) That the use of the word "shall" necessarily gives to that clause the effect of a new and substantive enactment having a time necessarily future to the time of the enactment of the Elkins Law. Each of these contentions is erroneous.

FIRST.—This relative clause does *not* refer solely to the physical transportation of the goods, but looks to such transportation in connection with the settlement of freight charges. Our opponents' interpretation of it completely divorces it from the words by which it is governed, the words "to give any rebate." The construction of the sentence is "it shall be unlawful to give any rebate whereby any property shall be transported at a less rate than that named in the tariffs." Of course, a rebate does not cause property to be *physically* transported. Therefore, the clause must refer to the *commercial* transaction—beginning with the shipment and ending with the payment of the rebate—and the goods are not "transported at a less rate than the tariff" until the rebate is paid. Up to that time the goods have been "transported" but they have not been "transported at a less rate than the tariff." The construction of our opponents is accomplished only by emphasizing the word "transportation" to the entire disregard of its accompanying qualifying words "at a less rate, etc." It follows, therefore, that the word "shall" is used with perfect propriety because the clause in which it stands relates to the time of the payment of the rebate, long after the enactment of the statute.

SECOND. Our opponents, by their emphasis upon the word "shall," virtually reconstruct the clause to read:

> "whereby any such property *which shall hereafter be transported*, shall be *so* transported at a less rate than that named, etc.,"

thus giving the word "shall" the meaning of a sub-

stantative enactment relating to transportation instead of a mere relative, referring to the giving of a rebate.

It is well settled that the use of the word "shall" in a clause like the present does not necessarily import a new and substantive enactment in the statute. In *Queen vs. Inhabitants*, 12 Q. B. Rep., 149, the Court was called upon to pass upon a statute regarding the removal of paupers from one parish to another which excluded from a five years' period of residence whereby the paupers were made irremovable, the time during which a person "*shall receive* relief from any parish * * * in which such person does not reside." This law had a penal feature imposing a forfeiture upon any person unlawfully procuring the removal of paupers. This statute was passed in 1846. The pauper in question had resided in St. John's Parish from 1839 until the order of removal in 1847, but had been receiving relief continuously from Christ's Church, the other parish, since 1843. The question was whether the period of time during which the pauper had been receiving relief before the passage of the statute was to be deducted from the period of her residence in St. John's. There, as here, the grammatical argument was relied on that "shall receive relief" merely referred to future relief, viz., after the date of the statute. The court denied the contention in language precisely applicable here :

> "The word 'shall' decides rather the happening of the event, on which the exception is to apply, within the time assumed to have been computed, than the future relation of such event to the time when the statute passed. It denotes the subjunctive mood rather than the future time."

Applying Lord DENMAN'S language to the Elkins Act and to the case at bar :

> "The word 'shall' decides rather the happening of the event, namely, the giving of a rebate (by

which, according to the decision in *United States v. Hanley, supra*, what was previously lawful became unlawful) than the future relation of the physical shipment on which such payment was made to the time when the Elkins Act was passed."

See, also,

People vs. Hawker, 152 N. Y., 234, aff'd 170 U. S., 189.
Commonwealth vs. Dracut, 8 Gray (Mass.), 455.
Forbes vs. State, 2 Penn. (Del.), 197, 203.
Fitzpatrick vs. Simonson, 86 Minn., 140.

The question of whether a clause like this is to be interpreted as an adjective clause or (as our opponents contend) as a substantive enactment, depends upon the *context* and the *purpose* of the law of which it is a part. Such was the canon of interpretation laid down by Chief Justice MARSHALL in *United States vs. Maurice*, 2 Brock., 96, in determining whether the constitutional provision that the President

> "Shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors * * * and all other officers of the United States, whose appointments are not herein otherwise provided for and *which shall be established by law.*"

He decided the question as to whether this italicized clause was an adjective or substantive provision by determining which interpretation "agrees with the general spirit of the constitution" (2 Brock., pp. 100–101). So here, when judged by the general purpose and context of this law, there can be no doubt that this clause was merely an adjective provision defining the character of the proposed rebates.

(a) The Elkins Law was merely an amending statute. The practices under consideration were already a crime

when committed by human agents. There was no object, therefore, in making any exceptions from the immediate operation of the Act as all such practices were already illegal. And, as we have already pointed out, the avowed object of the Congress was that all rebates should stop immediately. The construction of the Government fulfills that intention. Defendant's construction violates it as to certain payments.

(b) We have fully discussed the argument afforded from the context of the clause itself. The other clauses of the Act similarly enforce our construction. Of the three penal clauses which we have discussed under B, C and D, *supra*, the two former, relating solely to the carrier, as we have already pointed out, have no such limitations as to past shipments as our opponents seek to read into the third clause now considered. If, therefore, their contention is successful in importing such a distinction into the third clause which affects *both carriers and shippers*, the result will be a discrimination in the liability of shippers and carriers as to such shipments. Carriers will be liable in cases like this, under the first two clauses, where a shipper, whose liability is confined to the third clause, will escape altogether. Such a result is in conflict with the purpose of the law, adverted to by this Court in the *Armour* case, to make the liability of carriers and shippers the same, so far as possible.

POINT FOUR.

The Act, under the Government's construction, is not in any sense retroactive or ex post facto.

It looks forward and not backward to the offense which it denounces, namely, the payment of the rebate. It affects no vested rights for all agreements or

arrangements looking towards rebates were illegal and unenforceable. It was a simple exercise of the plain intention of Congress as demonstrated in countless ways.

In passing upon a similar indictment, charging the payment of a rebate in 1904 after the Elkins Law, in respect to property transported before the Elkins Law in 1902, Judge HOUGH said :

> "Assuming that the offense sought to be reached by this indictment is the giving—*i. e.*, the paying—of rebate moneys in 1904, the Elkins Act is not *ex post facto*. It did not impose a punishment for an act which was not punishable when it was committed. Nor did it impose additional punishment for such act, nor did it change the rules of evidence ; and if it did none of these things it does not transgress the constitutional limitations referred to."
>
> *United States vs. Great Northern R. R. Co.*, 157 Fed. Rep., 288, 290.

In this case, therefore, Congress did not penalize something heretofore lawful. It merely provided more effective remedies for proscribed illegalities. All the more applicable, therefore, is the doctrine invoked by this Court in the *Chesapeake and Ohio Coal* case, where it was held that an agreement between carrier and shipper, though lawful when made, is subject to the instantaneous prohibitions of the Elkins Law and cannot be carried so as to offend its provisions (*N. Y. N. H. & H. R. R. Co. vs. Interstate Commerce Commission*, 200 U. S., 361; so also *Armour Co. vs. United States*, 209 U. S., 56).

POINT FIVE.

Other points raised by plaintiff-in-error may be briefly disposed of.

Under its Fourth Point (p. 39), plaintiff-in-error argues that the indictment is bad either for duplicity or for ambiguity. The objection as to duplicity was never taken either by demurrer or at the trial. It is, therefore, waived even if it did exist (*Conners vs. United States*, 158 U. S., 408, 411; *Morgan vs. United States*, 148 Fed. Rep., 189).

As to ambiguity, we submit that each count of the indictment clearly and plainly sets out the offense charged in terms more full and more precise than would be required under the rule laid down by this Court in the *Armour case* (209 U. S. at p. 84).

So far as it is claimed that the indictment is ambiguous in that it charges an offense which is denounced by all three clauses of the Elkins Law, it has been fully treated under Point Three.

We think that all the other contentions of plaintiff-in-error's Fourth, Fifth, Sixth and Seventh Points have been fully answered in the course of our discussion in this brief.

We respectfully submit that the judgment of the Court below is right and should be affirmed.

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WADE H. ELLIS,
Assistant to
the Attorney-General.
HENRY L. STIMSON,
United States Attorney.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 57. Argued December 14, 15, 16, 1908.—Decided February 23, 1909.

Congress can impute to a corporation the commission of certain criminal offenses and subject it to criminal prosecution therefor.

In actions for tort a corporation may be held responsible for damages for the acts of its agent within the scope of his employment, *Lake Shore & Michigan Southern R. R.* v. *Prentice*, 147 U. S. 101, even if done wantonly, recklessly or against the express orders of the principal.

A corporation is responsible for acts not within its agent's powers strictly construed but assumed to be done by him when employing authorized powers, and in such a case no written authority under seal is necessary. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534.

The act of an agent exercising the authority of a corporation which is a common carrier to make rates for transportation may be controlled, in the interest of public policy, by imputing his act to the carrier itself and imposing penalties therefor upon the carrier.

While corporations cannot commit some crimes, they can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them.

Congress has power to so regulate interstate commerce as to secure equal rights to all engaged therein, and the act of February 19, 1903, c. 708, 32 Stat. 847, known as the Elkins act, is not unconstitutional because it imputes to the corporation, and makes it criminally responsible for, acts violative of the Interstate Commerce act done by its agent.

The court will recognize that the greater part of interstate commerce is conducted by corporations, and it will not relieve them from punishment because at one time there was a doctrine that corporations could not commit crimes.

Even if a statute relating both to individuals and corporations deprived an individual of the presumption of innocence and made him responsible for the acts of another, the question of the constitutionality of such statute on that ground cannot be raised by a corporation; and where, as in the case of the Elkins act, there is no doubt that

Congress would have enacted the statute as to corporations, even if it could not as to individuals, it is valid as to corporations. *Berea College* v. *Kentucky*, 211 U. S. 45.

Every statute is to be construed so as to maintain its constitutionality if possible.

The purpose of the Elkins act being to make the act of the agent the act of the corporation, and to include both within its restrictions, there is no misjoinder in including both the agent and the corporation in one indictment.

An indictment is sufficient if it specifically states the elements of the offense charged with sufficient particularity to fully advise the defendant thereof and so as to be pleaded in bar of any subsequent prosecution for the same offense. § 1025, Rev. Stat.

Under the Interstate Commerce act where a shipper pays the legal rate on numerous shipments and at intervals receives a rebate from the carrier there is a separate and complete offense on each payment and not one continuous offense, although all the payments were made under one agreement.

Quære, and not decided, what constitute separate offenses where numerous shipments are made and paid for at less than the published rates.

An instruction which simply amounts to permitting the jury to consider circumstances connected with the non-appearance of a witness and the non-production of books *held*, in this case, not to have been prejudicial error.

THE facts are stated in the opinion.

Mr. Austen G. Fox and *Mr. John D. Lindsay*, with whom *Mr. Albert H. Harris* was on the brief, for plaintiff in error:

Congress cannot under the Constitution impute to plaintiff in error the commission of a criminal offense and subject it to criminal prosecution and punishment by reason of the matters set forth in the indictment. To take the money of a corporation for crime committed by the individuals who control it, is to take the property of every stockholder. It amounts to punishing the innocent for the guilty. *State* v. *Great Works Mill Co.*, 20 Maine, 41; 2 Jurid. Soc. Papers, 31.

If correctly interpreted by the court below, the fourth clause of § 1 of the Elkins act declaring that the act, omission or fail-

ure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall be deemed to be the act of such carrier, as well as of that person, is unconstitutional. If misinterpreted by the court below the case was submitted to the jury upon a fundamentally erroneous theory. This applies in terms to any carrier engaged in interstate commerce, and, as construed by the court below, extends the principle of *respondeat superior* to criminal law, destroys the presumption of innocence as to all interstate carriers, and erects in its place a conclusive presumption of guilt against the carrier, based upon any unlawful act of any agent, although in excess of his actual authority.

The trial court admitted that a statute of this nature would probably be invalid in the case of individual carriers, but held it constitutional in the case of corporate carriers. This ruling disregarded the principle that a statute which is unconstitutional in part is unconstitutional as a whole, if the valid and invalid parts of the statute are inseparable. This court has refused to supply qualifications which the legislature has failed to express. *United States* v. *Fox*, 95 U. S. 670; *Employers' Liability Cases*, 207 U. S. 463. In the present case there is, of course, no possibility of such a severance. Moreover, even if the act had been directed against corporations alone, the presumption of innocence shields a corporation to the same extent that it shields an individual. *Inter. Com. Com.* v. *C. G. W. Ry.*, 209 U. S. 108, 119. Equal protection of the laws as well as due process of law is assured to corporations and individuals alike. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150. The rulings of the trial court involved the absolute denial of these rights. The conclusion follows that if the language of the statute compelled the rulings, the statute is unconstitutional, and, if the statute did not warrant the rulings, then the judgment should be reversed for the erroneous construction of the statute. Clark & Marshall, Law of Crimes (2d ed.), § 194 (i), p. 267; *Morse* v. *State*, 6 Connecticut, 9; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Peck* v. *Heurich*, 167 U. S. 624, 629.

The presumption of innocence prevails alike whether the defendant in a criminal prosecution be a corporation or an individual. *Int. Com. Com.* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 119.

One is not liable, *criminaliter*, for the act of his agent, even though the act be done in the course, or even within the general scope, of his lawful employment, in the sense in which we use that phrase in applying, *civiliter*, the doctrine of *respondeat superior*. The presumption of innocence excludes such a criminal responsibility. *Queen* v. *Holbrook*, L. R. 3 Q. B. D. 60, 63; *Reg.* v. *Ramsay*, 48 Law T. Rep. N. S. 733, 744; *People* v. *McLaughlin*, 150 N. Y. 365, 391; *United States* v. *Halberstadt*, Gilp. 262, 270; *Parsons* v. *Armor*, 3 Pet. 428; *McDonald* v. *Hearst*, 95 Fed. Rep. 656, 658, 660; *United States* v. *Gooding*, 12 Wheat. 460, 469; *Wynehamer* v. *People*, 13 N. Y. 378; *Interstate Com. Com.* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108; *Cummings* v. *Missouri*, 4 Wall. 277, 328; *Davis* v. *United States*, 160 U. S. 469; *State* v. *Devine*, 98 N. Car. 778; *Sullivan* v. *County of Oneida*, 61 Illinois, 242, 249; *State* v. *B. & O. R. R. Co.*, 15 W. Va. 362, 387; *Satterfield* v. *W. U. Tel. Co.*, 23 Ill. App. 446; *Commonwealth* v. *Putnam*, 4 Gray, 16; *Stockwell* v. *United States*, 13 Wall. 531; *Schreiber* v. *Sharpless*, 6 Fed. Rep. 175.

The Elkins act as construed below undertakes to determine a question that belongs to the courts.

Whether facts upon which rights depend are true or false is an inquiry for the courts to make, under legal forms. It belongs to the judicial department of the Government. *Birdsong* v. *Brooks*, 7 Georgia, 88, 92, cited in 2 Wigmore, Evid., § 1353, n. 2; *Ziegler* v. *S. & N. Ala. R. R. Co.*, 58 Alabama, 594; *Hoke* v. *Henderson*, 4 Dev. Law, 1, 15; *Bielenberg* v. *Montana U. Ry. Co.*, 8 Montana, 271, 277.

This clause of the Elkins act would not have been valid if limited to corporations, and this court may not read into the act an exception of a class constitutionally exempted so as to save what remains. *Gulf, Col. & S. F. Ry. Co.* v. *Ellis*, 150 U. S.

150; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 77; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, 108; *Boyd* v. *United States*, 116 U. S. 616, 635.

Classification based upon the dangerous character of the business is constitutional, but classification based merely on the character of the employer is not. *L. & N. R. R. Co.* v. *R. R. Comm. of Tenn.*, 19 Fed. Rep. 679; *Bedford Quarries* v. *Bough*, 168 Indiana, 671; *Ballard* v. *Oil Co.*, 81 Mississippi, 507; *Niagara Ins. Co.* v. *Cornell*, 110 Fed. Rep. 816, 825; *Duncan* v. *Missouri*, 152 U. S. 377; *Barbier* v. *Connolly Pipe Co.*, 113 U. S. 27, 31; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 337.

If it can be lawfully done, the duty of the courts is to construe the statute so as to render it constitutional, but this may be done only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. The court will not attempt to save a statute by making it "only partial in its operation." *Employers' Liability Cases*, 207 U. S. 497. See also *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Harris*, 106 U. S. 629; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Baldwin* v. *Franks*, 120 U. S. 678, 685, 690; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *Trade-Mark Cases*, 100 U. S. 82; *Allen* v. *Louisiana*, 103 U. S. 142; *Sprague* v. *Thompson*, 118 U. S. 90; *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 636.

The indictment is bad for the misjoinder as defendants of the plaintiff in error and its agents. Archbold's Cr. Pl. (22d ed.) 78; Wharton, Cr. Pl. & Pr. (9th ed.) 307; Nathaniel Lindley, 2 Jurid. Soc. Papers, 31; Morawetz, Priv. Corp., §§ 732–733; *People* v. *Clark*, 8 N. Y. C. R. 179, 215.

If the Elkins act permits the joinder under consideration, it is to that extent unconstitutional. *United States* v. *McKee*, 4 Dillon, 128; *Goffey* v. *United States*, 116 U. S. 436, 445; *United States* v. *One Distillery*, 43 Fed. Rep. 846; *S. C.*, 174 U. S. 149, 152; *United States* v. *Olsen*, 57 Fed. Rep. 579, 586.

The demurrer should have been sustained and the motions

to quash and in arrest of judgment granted, because of the substantial and structural defects of the indictment.

The acts described and set forth in the indictment do not constitute a crime, since it is not averred that by reason of the giving of the alleged rebates, any advantage was given or discrimination practiced. *Gridley* v. *Northwestern Life Ins. Co.*, 14 Blatch. 107; *United States* v. *Wiltberger*, 5 Wheat. 574, 576; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Interstate Comm.* v. *Ala. Mid. Ry.*, 168 U. S. 144, 166.

Nor does the indictment charge any other violation, either of the Elkins act, or the Interstate Commerce act.

The allegations of the indictment, and of each of the counts, are so ambiguous and indefinite as to make it uncertain what is the exact offense or offenses intended to be charged.

The facts set forth in the indictment and established by the evidence constituted but a single criminal transaction, and but a single penalty should have been imposed. *In re Snow*, 120 U. S. 275; *In re Nielson*, 131 U. S. 176; *Regina* v. *Firth*, L. R. I. C. C. 72; *S. C.*, 11 Cox, C. C. 234.

The principle underlying the rule which forbids the recovery for aggregated penalties under a penal statute unless the language of the statute clearly requires it, is peculiarly applicable to strictly criminal prosecutions. *State* v. *Cooper*, 13 N. J. L. 361; *State* v. *Commissioners*, 2 Murphy (N. C.), 371.

The Elkins act, so far from authorizing the splitting up of the transaction upon which the indictment is based into separate offenses, impliedly forbids it. *United States* v. *B. & A. R. Co.*, 15 Fed. Rep. 209; *United States* v. *St. L. & S. F. R. Co.*, 107 Fed. Rep. 870.

Mr. Henry L. Stimson, United States Attorney, with whom *The Attorney General* and *Mr. Assistant Attorney General Ellis* were on the brief, for defendant in error:

Congress has power, in the exercise of its constitutional function of regulating commerce, to enact laws which subject corporations to criminal prosecution and punishment. *Berea*

College v. *Commonwealth*, 211 U. S. 45; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Swift & Co.* v. *United States*, 209 U. S. 56; *C., B. & Q. Ry. Co.* v. *United States*, 209 U. S. 90; *Great Northern Railway Co.* v. *United States*, 208 U. S. 452; *Eastern Dredging Co.* v. *United States* and *Bay State Dredging Co.* v. *United States*, 206 U. S. 246; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Hackfeld & Co.* v. *United States*, 197 U. S. 442; *State* v. *Morris Ry. Co.*, 23 N. J. Law, 360 (creating a nuisance in erecting and building a public highway); *State* v. *Passaic Co. Society*, 54 N. J. Law, 260 (keeping a disorderly house); *United States* v. *Kelso*, 86 Fed. Rep. 304 (violation of Eight-Hour Law); *United States* v. *Alaska Packers' Association*, 1 Alaska, 217 (taking salmon unlawfully); *The State* v. *The B. & O. R. R. Co.*, 15 W. Va. 362 (Sabbath breaking); *Commonwealth* v. *Pulaski Association*, 92 Kentucky, 197 (permitting gaming on its fair grounds); *State* v. *Atchison*, 3 Lea (Tenn.), 729 (criminal libel); *State* v. *Nat. Bank*, 2 S. Dak. 568 (taking usurious rates of interest); *United States* v. *Van Schaick*, 134 Fed. Rep. 592, 602 (homicide, occasioned by an inadequate supply of life preservers); *United States* v. *McAndrews & Forbes Co.*, 149 Fed. Rep. 836 (violating Sherman Anti-Trust Law against conspiracy in restraint of trade); *United States* v. *New York Herald Co.*, 159 Fed. Rep. 296 (sending obscene matter through the mail).

The case at bar involves the constitutionality of the last paragraph of § 1 of the Elkins Law only in so far as it applies to corporate carriers. *Berea College* v. *Commonwealth*, 211 U. S. 45.

As a matter of fact, this paragraph of the Elkins Law does not apply to individual carriers. See Report of Interstate Com. Comm'n of January 17, 1902, also 6th Ann. Rep. Int. Com. Com. (1892) 39; 7th Ann. Rep. Int. Com. Com. (1893) 78; 9th Ann. Rep. Int. Com. Com. (1895) 23; 10th Ann. Rep. Int. Com. Com. (1896) 115.

In any event, the first paragraph of the Elkins Law which contains similar provisions, and provisions upon which the

judge's rulings could be sustained, is expressly limited to "corporation common carriers."

The so-called clause 4, § 1 of the Elkins act which declares that in construing and enforcing the provisions of that section, "the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person," is not only constitutional but is merely the statutory enactment of a rule of law already applied by this court in establishing liability of a corporation for the willful wrong of its agents. *Field* v. *Barber Asphalt Pav. Co.*, 194 U. S. 618, 621; *Atchison Co.* v. *Matthews*, 174 U. S. 96, 104; *Dow* v. *Beidelman*, 125 U. S. 680; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245 (sustaining a tax statute which treated as a separate class all railroad corporate property for purposes of taxation); see also *Metropolitan Street Railway Co.* v. *New York*, 199 U. S. 1, 47; *Lake Shore & Michigan Southern Railway Co.* v. *Prentice*, 147 U. S. 101, 109–111; see also *Denver & Rio Grande Railway* v. *Harris*, 122 U. S. 597; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85; see also *Eastern Dredging Co.* v. *United States*, 206 U. S. 246, 257.

The defendants were properly joined in the indictment, and the Elkins Law permitting such joinder is constitutional. *United States* v. *McGinnis*, 26 Fed. Cas. No. 15,678; *State* v. *Lehman*, 182 Missouri, 424 (with full collection of authorities); 22 Cyc. 373; *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. Rep. 823, 832, 833; *State* v. *Atchison*, 3 Lea (Tenn.), 729; *Banner Pub. Co.* v. *State*, 16 Lea, 176; *People* v. *Detroit White Lead Works*, 82 Michigan, 471; *Overland Cotton Mill* v. *People*, 32 Colorado, 263; Thompson on Corporations, § 4495; *Hale* v. *Henkel*, 201 U. S. 43.

The whole argument of the plaintiff in error is based upon doctrines which have been entirely outgrown by the development of the modern corporation and have long been obsolete. *Salt Lake City* v. *Hollister*, 118 U. S. 256, 259; see also *Good-*

speed v. *The East Haddon Bank*, 22 Connecticut, 530, 536; *Philadelphia &c. R. R. Co.* v. *Quigley*, 21 Howard, 202.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, sued out by the New York Central and Hudson River Railroad Company, plaintiff in error. In the Circuit Court the railroad company and Fred L. Pomeroy, its assistant traffic manager, were convicted for the payment of rebates to the American Sugar Refining Company and others, upon shipments of sugar from the city of New York to the city of Detroit, Michigan. The indictment was upon seven counts and was returned against the company, its general traffic manager and its assistant traffic manager. The first count, covering the offering of a rebate, was withdrawn from the jury by the district attorney, and it is unnecessary to consider it. The second count charges the making and publishing of a through tariff rate upon sugar by certain railroad companies, including the plaintiff in error, fixing the rate at twenty-three cents per 100 pounds from New York city to Detroit, and charges the railroad company's general traffic manager and assistant traffic manager with entering into an unlawful agreement and arrangement with the shippers, the American Sugar Refining Company of New York and the American Sugar Refining Company of New Jersey, and the consignees of the sugar, W. H. Edgar & Son, of Detroit, whereby it was agreed that for sugar shipped over the line, the full tariff rate being paid thereon, the railroad company should give a rebate of five cents for each 100 pounds. This count charges that during the months of April and May, 1904, shipments were made under this agreement and the regular tariff rates paid thereon. On July 14 of that year a claim for a rebate in the sum of $1,524.99 was presented by the agents of the shipper and consignees and paid on the thirty-first day of August to Lowell M. Palmer, agent of the sugar company, for the benefit of the shippers and

consignees. In each of the counts, except the sixth, the lawful rate is charged to have been 23 cents per 100 pounds. During the month of June, 1904, the same was reduced to 21 cents per 100 pounds, and the rebate agreed to and paid being 3 cents per 100 pounds. The second count covers the shipments of April and May, 1904; the third count, the shipments for July and August, 1904; the fourth for September, 1904; the fifth for October, 1904; the sixth for June, 1904, and the seventh for April and May, 1904. In each of these counts there is an allegation of the payment of the published rate, the presentation of the claim for the rebate, and the statement of a specific sum allowed and paid on account thereof.

Upon the trial there was a conviction upon all of the six counts, two to seven inclusive. The assistant traffic manager was sentenced to pay a fine of $1,000 upon each of the counts; the present plaintiff in error to pay a fine of $18,000 on each count, making a fine of $108,000 in all.

The facts are practically undisputed. They are mainly established by stipulation, or by letters passing between the traffic managers and the agent of the sugar refining companies. It was shown that the established, filed and published rate between New York and Detroit was 23 cents per 100 pounds on sugar, except during the month of June, 1904, when it was 21 cents per 100 pounds.

The sugar refining companies were engaged in selling and shipping their products in Brooklyn and Jersey City, and W. H. Edgar & Son were engaged in business in Detroit, Michigan, where they were dealers in sugar. By letters between Palmer, in charge of the traffic of the sugar refining companies and of procuring rates for the shipment of sugar, and the general and assistant traffic managers of the railroad company, it was agreed that Edgar & Son should receive a rate of 18 cents per 100 pounds from New York to Detroit. It is unnecessary to quote from these letters, from which it is abundantly established that this concession was given to Edgar & Son to prevent them from resorting to transportation by the water route between New

York and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers. The shipments were made accordingly and claims of rebate made on the basis of a reduction of five cents a hundred pounds from the published rates. These claims were sent to the assistant freight traffic manager of the railroad company by Palmer, the agent of the sugar companies, and then sent to one Wilson, the general manager of the New York Central and Fast Freight Lines of Buffalo, New York. Wilson returned to the assistant traffic manager of the railroad company a cashier's draft for the amount of the claim. This draft was then sent to the agent of the sugar companies and his receipt taken. It was stipulated that these drafts were ultimately paid from the funds of the railroad company.

Numerous objections and exceptions were taken at every stage of the trial to the validity of the indictment and the proceedings thereunder. The principal attack in this court is upon the constitutional validity of certain features of the Elkins act. 32 Stat. 847. That act, among other things, provides:

"(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

* * * * * * * *

"In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed

to be the act, omission or failure of such carrier, as well as of that person."

It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence, a presumption which is part of due process in criminal prosecutions. It is urged that as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as indeed the stockholders could not do so, the arguments come to this: that owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case.

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (*Anonymous*, 12 Modern, 559) that "a corporation is not indictable, although the particular members of it are." In Blackstone's Commentaries, chapter 18, § 12, we find it stated: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may in their distinct individual capacities." The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: "Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the

things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." Without citing the state cases holding the same view, we may note *Telegram Newspaper Company* v. *Commonwealth*, 172 Massachusetts, 294, in which it was held that a corporation was subject to punishment for criminal contempt, and the court, speaking by Mr. Chief Justice Field, said: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong." It is held in England that corporations may be criminally prosecuted for acts of misfeasance as well as nonfeasance. *Queen* v. *Great North of England Railway Company*, 9 Queen's Bench, 315.

It is now well established that in actions for tort the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. *Lake Shore & Michigan Southern R. R.* v. *Prentice*, 147 U. S. 101, 109, 111.

And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct. *Lothrop* v. *Adams*, 133 Massachusetts, 471.

A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the

agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act. *Washington Gaslight Co.* v. *Lansden*, 172 U. S. 534, 544.

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted by the defendant at the trial that at the time mentioned in the indictment the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central and Hudson River Company, and were authorized to unite with other companies in the establishing, filing and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and

charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz on Corporations, § 733; Green's Brice on Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy.

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions enured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins Law, making corporations criminally liable.

This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike. *New Haven Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 399; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to

give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.

It is contended that the Elkins Law is unconstitutional, in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and of the presumption of innocence which the law raises in his favor. This contention rests upon the last paragraph of § 1 of the Elkins Act, which is as follows, 32 Stat. 847:

"In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person."

We think the answer to this proposition is obvious; the plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section. There is no individual in this case complaining of the unconstitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions. *Employers' Liability Cases*, 207 U. S. 463. It may be doubted whether there

are any individual carriers engaged in interstate commerce, and every act is to be construed so as to maintain its constitutionality if possible. There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations. *Berea College* v. *Kentucky*, 211 U. S. 45, 55.

It is contended that the court should have sustained the objection to the indictment upon the ground that the corporation and its agents could not be legally joined therein, but we think a fair construction of the act permits both the corporation and the agent to be joined in one indictment for the commission of the offense. The purpose of the act was to make the act one of the corporation as well as of the agent, and to include both within the prohibitions and restrictions of the statute, and this seems to be the accepted practice. Thompson on Corporations, § 4495.

Objections were made as to the sufficiency of the indictment based upon its want of particularity in describing the offense intended to be charged. Section 1025 of the Revised Statutes of the United States provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed, there can be no reversal. *Connors* v. *United States*, 158 U. S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84. An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense.

It is insisted that if any criminal offense was committed at all it was a single and continuing one against the railroad company, because of the agreement evidenced by the letters which

preceded the transportation, and under the terms of which the shipments were made. We cannot agree to this contention. The statute makes it an offense to give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate; in the present case the jury found the railroad company guilty of rebating as charged. We are not dealing with a case where there was an agreement to carry the goods in the first place at a concession from the established rate, and wherein the railroad company never received the full legal rate. In this case, upon each of the numerous shipments, the full legal rate was paid, and upon claims being presented at short intervals the amount of the stipulated rebate was remitted by check to the shipper. We think the offense was complete when the railroad company thus paid the stipulated rebate to the shipper.

It is further contended that the court below erred in its reference to the absence of the witness Embleton, and the nonproduction of books in which entries were made concerning the transactions in question. It appears that Embleton was a clerk in the employ of Wilson, and had charge of the books in which these transactions were entered, that he did not appear at the trial, having left because of sickness, nor were the books produced. The comment objected to was made in connection with this paragraph of the charge:

"On this question of intent also, gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guilford was headed private and confidential. It will be proper for you to take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct check drawn at Buffalo by or on behalf of this defendant, was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical Bank in favor of Mr. Palmer; and you may take into consideration upon that question the evidence in this case that the original claims presented by Palmer to Pomeroy and sent by Pomeroy to Wilson

have been destroyed; and the fact that when Embleton, the man in charge of the shipments, left the employment there a book containing entries in reference to these claims disappeared, and that Mr. Wilson testified in this case that he did not know where it was.

"Now it is for you to say, gentlemen, whether these occurrences and these facts are consistent with innocence or with guilt, because if a man carries on an act, or any person does anything which upon its face is apparently unlawful, and he does it in a furtive and secret manner, showing that his intention while he does the act is to do it in such a way as to conceal it, the jury may draw the inference from that fact, if they see fit—they are not obliged to, but they may if they see fit—that the intention with which the act was done was to perform an illegal or a criminal act."

We do not perceive any prejudicial error in this charge. It simply amounted to permitting the jury to consider the circumstances enumerated as bearing upon the guilty purposes of the parties charged in the indictment. It left to the jury to attach such weight as they saw fit to the circumstances of Embleton's absence and the non-production of the books. It is to be noted in this connection that the judge, in the latter portion of his charge, at the request of the defendant, said: "There is no evidence that the defendant corporation or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the Government has asked."

We have noted all the assignments of error which involve questions of a substantial character.

We find no error in the proceedings of the Circuit Court, and its judgment is

Affirmed.

MR. JUSTICE MOODY took no part in this case.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY *v.* UNITED STATES (NO. 2).

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 69. Argued December 14, 15, 16, 1908.—Decided February 23, 1909.

New York Central R. R. Co. v. *United States*, *ante*, p. 481, followed as to constitutionality of the Elkins act of February 19, 1903, c. 708, 32 Stat. 847, and as to when offenses of giving rebates in violation of the Interstate Commerce act are complete.

The Elkins act applies to rebates paid after it went into effect although paid in pursuance of an agreement, and on shipments, made prior to that date, the agreement being illegal when made.

An indictment which definitely sets forth the elements of the offense of which it was intended to charge the accused is sufficient; and in this court only substantial defects in the indictment are available to reverse a judgment of conviction. *Connors* v. *United States*, 158 U. S. 408.

THE facts are stated in the opinion.

Mr. Austen G. Fox and *Mr. John D. Lindsay*, with whom *Mr. Albert H. Harris* was on the brief, for plaintiff in error.

Mr. Henry L. Stimson, with whom *The Attorney General* and *Mr. Assistant Attorney General Ellis* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued and submitted with No. 57, just decided. In the Circuit Court of the United States for the Southern District of New York the plaintiff in error was convicted by the verdict of a jury, and sentenced under the Elkins act, 32 Stat. 847, to pay a fine of $18,000. The indictment consisted of two counts. The first charges the establishment and

publication of the tariff rate upon sugar over the line of the plaintiff in error and other railroads, from the city of New York to the city of Cleveland, Ohio, at the rate of 21 cents per hundred pounds; that on November 20, 1902, the railroad company entered into an unlawful agreement with the shipper, the American Sugar Refining Company, whereby its sugar should be shipped over said lines, and the lawful tariff being paid thereon the railroad company would give a rebate to the shipper of 6 cents for each hundred pounds of sugar transported to Cleveland, Ohio, for reconsignment to points beyond, and a rebate of 4 cents for each one hundred pounds transported to Cleveland for local delivery. The agreement further stipulated that the shipper should present its claim for rebate under the agreement aforesaid, and the same should be paid by the railroad company, thereby reducing the published tariff by 6 cents, or 4 cents for each hundred pounds of sugar, according to the destination thereof. The carriage of sugar under the arrangement was charged, payment of the published tariff rates, and the presentation of claims for rebates is also alleged, and it is charged that on April 3, 1903, the railroad company paid to the American Sugar Refining Company $26,141.81 by way of rebate in respect of the transportation of sugar under the agreement.

The second count is substantially the same as the first, except the allegation of the preliminary arrangement to pay the rebates is omitted. The record discloses that the plaintiff in error and other railroad companies, during the time covered in the indictment, had established and were operating a fast freight line from the city of New York to the city of Cleveland; that the published rate for the transportation of sugar over said route from New York to Cleveland was 21 cents per hundred pounds; that Nathan Guilford and Fred L. Pomeroy, the general freight traffic manager and the assistant freight traffic manager, respectively, of the defendant were authorized to establish rates at which freight was to be carried, and to unite with other companies in establishing, filing and publishing a list

of through rates. The record also discloses that the American Sugar Refining Company was a New Jersey corporation engaged in refining sugar in Brooklyn and Jersey City; that it made large shipments to Cleveland as well as to other parts of the country; that the sales department of the company, which routed the sugar sold to different parts of the country and transported over different railroads, acted according to instructions received from one Lowell M. Palmer, who was in charge of the handling of the railroad business of the company, and furnished the sales department with freight rates and arrangement of routes for the shipments. It also appears that on the twenty-fourth day of July, 1902, with an assistant named Riley, Palmer met Pomeroy at his office, and a memorandum was thereupon made evidencing an agreement between the parties as follows:

"*Memorandum made July* 24, 1902.

"Present—

"Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

"Sugar shipments to Cleveland and beyond:

"1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.

"2d. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4½ cents per 100 pounds.

"3d. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.

"4th. The New York Central to make reclamation against Mr. L. M. Palmer for a refund of 1½ cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

"5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause of this memorandum on the basis of 6 cents per 100 pounds.

"6th. This arrangement to apply to all sugar billed to Merwin Street Warehouse, whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds."

Afterwards, by an exchange of letters between Palmer and Guilford, 4 cents a hundred pounds was fixed as the rebate to be allowed on sugars delivered in the city of Cleveland, and 6 cents upon shipments reconsigned beyond the city of Cleveland. Between July 24, 1902, and December 6, 1902, the American Sugar Refining Company shipped a large amount of sugar from New York to Cleveland, paying thereon the full tariff rate of 21 cents per one hundred pounds. Thereafter claims were made up under the direction of Palmer against the New York Central and Hudson River Railroad Company, purporting to be for overcharges, and which were made upon the basis agreed upon in the memorandum aforesaid, and no evidence was introduced in the case showing that these rebates had any legitimate ground to rest upon. These claims were allowed and paid as hereinafter stated.

Objections as to the constitutionality of the Elkins act were made in this case, and as they are disposed of in the opinion announced in No. 57, just decided, the conclusions therein stated need not be repeated. The point principally urged for a reversal of the judgment in this case turns upon the construction of the Elkins act, having reference to the fact that the property concerning which the agreement for a rebate was made was transported prior to the taking effect of the Elkins act, February 19, 1903. In this case the agreement was made July 24, 1902, and the goods were actually transported before the act went into effect. The payment of the rebate was made on April 2, 1903, after the act went into effect. As we have

already had occasion to hold in No. 57, *ante*, where the legal tariff rate was, in fact, paid by the shipper to the carrier, the rebating was not complete until the money was actually refunded. The legal and published rate was the one which the carrier was obliged to pay, and no arrangement for any different rate could have been enforced at any time against the carrier. *Texas & Pacific Railway Co.* v. *Mugg*, 202 U. S. 242; *Gulf Railroad Co.* v. *Hefley*, 158 U. S. 98.

Before considering the terms of the Elkins act it is to be noted that the arrangement for the rebate was an illegal act, for which the agents of the carrier might have been criminally punished in accordance with the terms of the Interstate Commerce act then in force. Sections 6 and 10, 25 Stat. 855. The Elkins act amended the former law by providing punishment in criminal proceedings against the corporation as well as its agents for the offense of making illegal rebates from the published tariff rates. There was then no vested right in the shipper or the carrier to have the illegal agreement consummated by the payment of the rebate arranged for. In this attitude and with the purpose of making the law more effectual it was amended by the Elkins act so as to bring corporations within the provisions of the law and to make offenses under it punishable by criminal proceedings against corporations.

The Elkins act provides:

"And it shall be unlawful for any person, persons, or corporations to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commence by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carriers as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination practiced." C. 708, 32 Stat. 847.

It is the contention of the plaintiff in error that the language

of this statute addresses itself to the future, and it asks the application of the well-known rule that statutes are presumed to be prospective in their operation, and contends that this act has no reference to property transported in interstate commerce at less than the published rates at any time before the act went into effect. Reading the latter part of the sentence, "whereby any such property shall by any device whatever be transported at a less rate," etc., the act would seem to have reference to future transportations only. But in an earlier part of the same sentence it has been provided that it shall be unlawful to offer, grant, or give, to solicit, accept or receive any rebate in respect to property in interstate commerce transportation "whereby any such property shall be transported at a less rate than that named in the tariffs," etc. Taking the sentence altogether it is apparent that its purpose is to punish the giving of a rebate, in respect of transportation of property in interstate commerce, which shall have the effect to give or receive such transportation at less than the published rates.

Manifestly the act does not refer alone to the transportation of the property, although that is an essential element of the offense, but the thing aimed at is the giving or receiving of a rebate whereby the property shall be transported at less than the rates named in the published tariffs. It is the transaction of giving or receiving the rebate, etc., with the effect that the goods of the shipper thus preferred shall be transported at a reduction from the published rates, which is penalized.

As we have had occasion to say in No. 57, *ante*, the giving of the rebate is complete and the offense committed when a part of the legal rate already paid has been refunded. The word *shall* refers to the happening of the event—the giving of the illegal rebate—and was not introduced into the statute for the purpose of making future transportation illegal. No new legislation was required to make transportation under such an agreement illegal. The object of the statute was to punish rebates given or received after the passage of the act in respect of prop-

erty, the subject of interstate transportation, and to make the carrier corporation criminally liable therefor.

We think that the Circuit Court was right in holding that this section of the law applied to the rebate paid in April, 1903, after the taking effect of the Elkins act.

Objections were taken to the indictment, but we think that it sets forth with sufficient definiteness the elements of the offense of which it was intended to charge the plaintiff in error. At this stage of the proceedings only substantial defects in the indictment are available to reverse the judgment of conviction. *Connors* v. *United States*, 158 U. S. 408, 411.

Error is alleged to have been committed in what the court said to the jury upon their return into court after the charge. The record upon this subject is as follows:

"The court thereupon charged the jury further as follows:

"Gentlemen, I have received this paper from the foreman of the jury: 'Does the payment of rebate after the passage of the Elkins act on shipments made before the passage of the act constitute a crime under the law?'

"To that I reply that it does, provided the payment was made with a criminal intent. That criminal intent does not mean with any wicked intent. The payment of rebates is not morally a crime. It was made a misdemeanor by statutes, and if a corporation or officer of a corporation pays a rebate with an intent thereby to make the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent.

"There are three provisions in this act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

"Under another provision of this act if you find that this

defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate concession or discrimination upon the property transported in this case, 'whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule,' you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law. You may retire, gentlemen.

"Mr. LINDSAY: I would like to call your honor's attention to the fact that you instructed the jury they might find the defendant guilty if they 'offered.' There is no charge in this indictment of offering.

"The COURT: I did not say offer, I think.

"Mr. LINDSAY: Your honor used the word offer.

"The COURT: I withdraw that expression if I used it. I did not intend to use it.

"Mr. LINDSAY: I also ask your honor in this connection to charge as this indictment is framed under the Elkins law they cannot convict the defendant upon this indictment for anything which transpired before the going into effect of the Elkins act.

"The COURT: Undoubtedly the payment of the rebate must have taken place after the passage of the act. The fact that the property was transported before the passage of the act does not bar a conviction in this case."

It is contended that the effect of this charge was to permit the defendant to be convicted of violating the act of 1887 as amended in 1889, 25 Stat. 855, while the charge in the indictment, framed under the Elkins act, was intended to reach an offense committed after it went into effect, and to cover the unlawful rebate alleged to have been paid in April, 1903, after the taking effect of that act. But we think this part of the record should be read in connection with the charge of the court to the jury, in which the court gave a history of the previous

act to regulate commerce, under § 6 of which it is provided, that "it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time," and referred in that connection to the amendatory character of the Elkins act and the provisions thereof making the act, omission or failure of the officer, agent, etc., within the scope of his employment, the act, omission or failure of the carrier as well as such person. This part of the charge was apparently by way of introduction to the charge covering the specific requirements of the Elkins act. The judge in his charge summarized and commented upon the facts proved or admitted in the case, and in concluding said:

"Now, gentlemen, no evidence has been offered on behalf of the defendant in the case, and I understand from the argument of counsel that the defendant's defense in the case is the denial of any criminal intent. Gentlemen, intent is essential to the establishment of any charge of crime. Of course there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins act and in the Interstate Commerce act, or was it paid for some legitimate and proper overcharge or cause? That is the simple question in this case for you to determine, and that question I leave for you to pass upon on the consideration of all the evidence in the case."

This charge, taken in connection with what occurred when the jury returned, and the colloquy which followed between

court and counsel, does not, we think, leave in doubt that the court submitted to the jury as a basis of conviction only the acts which occurred after the passage of the Elkins act. The acts amounting to a violation of that law were specifically charged in the indictment and admitted or proved at the trial.

The charge, taken together, submitted the question of the intent of the defendant to do, through the acts of its agents authorized by it, the things denounced in the statute. The charge was as favorable as the plaintiff in error was entitled to, and we find no substantial error in the proceedings.

Judgment affirmed.

MR. JUSTICE MOODY took no part in the decision of the case.